No. 2160

United States Circuit Court of Appeals
for the Ninth Circuit.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Plaintiff in Error,

vs.

ELI MELOVICH,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

Records of U. S. Circuit
Court of Appeals
744

No.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
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TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

INDEX.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant and Plaintiff in Error.

No. 1934.

NAMES AND ADDRESSES OF COUNSEL.

JAMES A. KERR, Esq.,
1309 Hoge Building, Seattle, Washington.
Attorney for Defendant and Plaintiff in Error.

E. S. McCORD, Esq.,
1309 Hoge Building, Seattle, Washington.
Attorney for Defendant and Plaintiff in Error.

HERBERT W. MEYERS, Esq.,
432 Pioneer Building, Seattle, Washington.
Attorney for Plaintiff and Defendant in Error.

CHAS. A. ENSLOW, Esq.,
430 Pioneer Building, Seattle, Washington.
Attorney for Plaintiff and Defendant in Error.

ELI MELOVICH,

Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION,

Defendant.

No. 77554.

RECORD ON REMOVAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF KING, TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

INDEX.

In the Superior Court of the State of Washington, for King County.

ELI MELOVICH,
Plaintiff,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

MOTION.

Comes now the above named defendant and moves the court for an order requiring plaintiff to strike from his complaint and make said complaint more definite and certain as is hereinafter set out:

I.

Referring to paragraph four therein to strike that part beginning with the word "that" in the first line thereof and ending with the word "gears" in the seventh line thereof for the reason that said part is a conclusion.

II.

Referring to paragraph six of said complaint to strike therefrom that part of said paragraph beginning with the word "employment" in the fourth line thereof, and ending with the word "agent" in the sixth line thereof, for the reason that said part is a conclusion.

III.

And to further strike from said paragraph six that part beginning with the word "that" in the fortieth line thereof and ending with the words "Slim Dickey" in the forty-ninth line thereof for the reason that said part is wholly immaterial and irrelevant.

IV.

To strike from said sixth paragraph that part thereof beginning with the words "Plaintiff's main work" in the fifty-second line thereof, and ending with the word "aforementioned" in the fifty-fourth line thereof, for the reason that said part is immaterial and redundant.

V.

To strike from said paragraph six of the complaint beginning with the words "and being a foreigner" in the sixty-second line thereof and ending with the word "unprotected machinery" in the sixty-fourth line thereof, for the reason that said part is wholly immaterial and irrelevant.

VI.

Referring to paragraph seven of the complaint, this defendant moves the court for an order requiring plaintiff to strike the whole thereof from the complaint for the reason that said paragraph is redundant.

VII.

Referring to paragraph eight of said complaint, defendant moves the court for an order to strike the whole thereof from said complaint, for the reason that said paragraph is wholly immaterial.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. A. Kerr being first duly sworn, on oath says, that he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing motion, knows the contents thereof and believes the same to be meritorious and well founded in law.

J. A. KERR.

Subscribed and sworn to before me this 7th day of Defendant, 1910.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy of within motion received and due service of same acknowledged this 7th day of December, 1910.

IVAN BLAIR,
Attorneys for Plaintiff.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington, for King County.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING COPORATION, a Corporation, *Defendant.*	No. 77554. PETITION FOR REMOVAL

To the Honorable Superior Court of the State of Washington for King County:

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars, and that the controversy in said suit is between citizens of different states; that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of said suit and still is a resident of the City of Boston, State of Massachusetts, and a non-resident of the State of Washington; that your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and that its principal place of business is in the City of Boston, State of Massachusetts, and that the plaintiff was at the time of the commencement of this action and still is a resident of King County, State of Washington. Your petitioner offers herewith a good and sufficient surety for its entering into the Circuit Court of the United States for the Western District of Washington, Northern Division, on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner alleges that it has a good and meritorious defense in the above entitled cause.

Your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the Circuit Court of the

United States in and for the Western District of Washington, Northern Division, and it will ever pray.

STONE & WEBSTER ENGINEERING COPORATION,
By Kerr & McCord.
Its Attorneys.

State of Washington,
County of King—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the petitioner above named; that he has read the foregoing petition for removal and knows the contents thereof and believes the same to be true.

J. A. KERR.

Subscribed and sworn to before me this 7th day of December, A. D. 1910.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

State of Washington,
County of King—ss.

On this 7th day of December, A. D. 1910, in the County of King, State of Washington, before me a Notary Public in and for said State of Washington, personally appeared J. A. Kerr, to me known to be the individual who executed the foregoing petition, and then and there acknowledged to me that he executed the same for and on behalf of the petitioner Stone & Webster Engineering Corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

The foregoing and within petition is hereby on this 10th day of December, 1910, granted in open court.

JOHN F. MAIN, Judge.

Copy of within Petition for Removal received and due service of same acknowledged this 7th day of December, 1910.

IVAN BLAIR,
Attorneys for Plaintiff.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. ..... BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That Stone & Webster Engineering Corporation, a corporation, as principal, and the National Surety Company of New York, a corporation organized under the laws of the State of New York, and duly authorized to transact a surety business in the State of Washington, as surety, are holden and stand firmly bound unto Eli Melovich, in the penal sum of Five Hundred Dollars, for the payment of which well and truly to be made unto the said Eli Melovich, his heirs, representatives and assigns, they bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Upon condition nevertheless that whereas the said Stone & Webster Engineering Corporation has petitioned the Superior Court in and for King County, State of Washington, for the removal of a certain cause pending therein, wherein the said Eli Melovich is plaintiff and the said Stone & Webster Engineering Corporation is defendant, to the Circuit Court of the United States for the Western District of Washington, Northern Division;

Now if the said Stone & Webster Engineering Corporation shall enter into the said Circuit Court of the United States on the first day of its next term, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said Stone & Webster Engineering Corporation has caused these presents to be executed by its attorneys, and the National Surety Company has caused these presents to be executed by its Resident Vice-President, Resident Assistant Secretary, this 7th day of December, A. D. 1910.

STONE & WEBSTER ENGINEERING CORPORATION,
By Kerr & McCord, Its Attorneys.

NATIONAL SURETY COMPANY,

(Seal) By Robt. A. Hulbert, Resident Vice-President.

Attest: Geo. W. Allen, Resident Assistant Secretary.

Approved Dec. 10, 1910. John F. Main, Judge.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 77554

Nature of Motion.
Petition for removal.
Notice of issue of law.
Department No. 3.
Last pleading served Dec. 7, 1910.
To Messrs. Meyers & Blair,
Attorneys for Pltf.

Please take notice that the issue of law in the above entitled cause will be brought for trial on the 10th day of Dec., 1910.

KERR & McCORD,
Attorney for Deft.

I hereby acknowledge receipt of true copy of within note and notice, and admit true service thereof Dec. 7, 1910.

IVAN BLAIR,
Attorney for Pltf.

Filed Dec. 12, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for the County of King.

ELI MELOVICH,

vs.

STONE & WEBSTER ENG. CO.

No. 77554.

Saturday, December 10, 1910.

HON. JOHN F. MAIN, Judge.

Order of removal signed.
Bond approved.
Min. Book No. 6.
Page 12.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 77554.

Wednesday, December 21, 1910.

HON. R. B. ALBERTSON, Judge.

Order of removal signed.
Minute Book No. 3, Page 335.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

ORDER

This cause coming on regularly for hearing this 21st day of December, A. D. 1910, and it appearing to the Court that heretofore and on the 10th day of December, 1910, a petition for the removal of the above entitled cause to the Circuit Court of the United States for the Western District of Washington, Northern Division, was duly presented and granted and that the bond on removal required by law was duly approved and filed;

It is now by this Court ordered that the above entitled cause be removed into the United States Circuit Court for the Western District of Washington, Northern Division, and that the Clerk of this Court forthwith prepare a complete record of said cause and forward the same to the said United States Circuit Court.

R. B. ALBERTSON, Judge.

Filed Dec. 21, 1910. D. K. Sickels, Clerk.

State of Washington,
County of King—ss.

I, D. K. Sickels, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington, in and for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the entire record and filed in cause No. 77554, Eli Melovich vs. Stone & Webster

Engineering Corporation as the same appear of record and on file in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court, this 24th day of Dec., A. D. 1910.

(Seal) D. K. SICKELS, Clerk.
By W. K. Sickels, Deputy Clerk.

Filed U. S. Circuit Court. Western District of Washington, Dec. 24, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter our appearance as attorneys for defendant in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving the same with

KERR & McCORD,

Office address: 318 Mutual Life Bldg., Seattle, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court, Western District of Washington, Dec. 24, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

To Eli Melovich and to Iran Blair and Herbert W. Meyers, His Attorneys:

You and each of you will please take notice that the record on removal in the above entitled cause has this 24th day of December, 1910, been filed with the Clerk of the above entitled Court.

KERR & McCORD,
Attorneys for Defendant.

Copy of within Notice received and due service of same acknowledged this 24th day of Dec., 1910.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Notice. Filed U. S. Circuit Court, Western District of Washington, Dec. 27, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Superior Court of the State of Washington in and for the County of King.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

SUMMONS.

The State of Washington to the Stone & Webster Engineering Corporation, a Corporation, the above named Defendant:

You are hereby summoned and required to appear within twenty days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled cause in the Superior Court of the State of Washington, for King County aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorneys for plaintiff at their offices below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the Clerk of the said Court, a copy of which is herewith served upon you.

HERBERT W. MEYERS,
IVAN BLAIR,
Attorneys for Plaintiff.

Postoffice and Office Address: 430-33 Pioneer Building, Seattle, King County, Washington.

In the Superior Court of the State of Washington in and for King County

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one M. J. Whitson as its resident and statutory agent, and as such is liable to be sued in the Courts of this State.

II.

That the defendant on the 12th day of July, 1910, and prior thereto operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant for the purpose of manufacturing concrete. That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie

Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and on which cogs and gears the employees of the defendant were liable to come in contact, while in the performance of their duty as such employees, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employees therefrom.

IV.

That it was necessary to the safe operation of the said cogs and gears and to the safety of employees when operating the same that the said cogs and gears should be properly protected and guarded by the use of guards so as to form a shield to ward off and keep the hands and arms of such employees from coming in contact with such cogs and gears; and without such guards it would be dangerous to any employee using the same, all of which was well known to the defendant.

V.

That the defendant on or about the said date and prior thereto failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected.

VI.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in the said establishment, and that by reason of said employment it was the duty of the plaintiff among other things to oil the said cogs and gears under the direction of the defendant's agent, and that on said date the plaintiff was ordered by defendant's foreman to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence

on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's directions as aforesaid; came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, his breast torn open so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pains in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned, and that work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned. Plaintiff's main work was at the motor below this concrete elevator running the cars afore-

mentioned, but plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had according to instructions done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery, and being a foreigner and unfamiliar with machinery did not realize the dangers accompanying work around unprotected machinery. Plaintiff at the time of said injury was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VII.

All of said injuries were caused by the negligence of the defendant in not having said cogs and gears properly guarded and in allowing the same to be used without guards, and all without the fault of the plaintiff.

VIII.

That within six months after plaintiff received said injuries, to-wit: on the 19th day of October, 1910, and again on the 2nd day of November plaintiff gave a notice in writing of the time, place and cause of his said injuries, which notice was signed by Herbert W. Meyers, his attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year has not elapsed since the happening of said injuries.

IX.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three ($3.00) Dollars per day, and by reason of this accident he has lost in wages approximately Two Hundred and Sixty-two ($262.00) Dollars.

X.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand ($12.000.00) Dollars.

WHEREFORE: Plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred and Sixty-two ($12,262) Dollars, together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
IVAN BLAIR,
Attorneys for Plaintiff.

State of Washington,
County of King—ss.

Eli Melovich, being first duly sworn to tell the truth, deposes and says as follows: I am the plaintiff in the above entitled cause and I have read the foregoing complaint and know the contents thereof and believe the same to be true.

His
ELI X MELOVICH.
Mark

Witness: E. Bielich.

Subscribed and sworn to before me this 31st day of October, 1910.

HERBERT W. MEYERS,
Notary Public in and for the State of Washington,
residing at Seattle.

Service made Nov. 23, 1910.

Indorsed: Summons and Complaint. Filed U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, *Defendant.*	No. 1934. APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter my appearance as attorney for Eli Melovich in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said plaintiff, by leaving the same with

HERBERT W. MEYERS,

Office Address: 430-3 Pioneer Bldg., Seattle, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court Western District of Washington, Apr. 26, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

STIPULATION.

It is stipulated and agreed by and between Eli Melovich, plaintiff above named, by his attorneys Herbert V. Meyers and Ivan Blair, and Stone & Webster Engineering Corporation, a corporation, the above named defendant, by its attorneys Kerr & McCord, that the petition for removal in the above entitled cause and that part thereof referring to the residence of the above named plaintiff, may be amended in such a manner as to show that the above named plaintiff is not only a resident and was a resident of the State of Washington at the time of the institution of the above entitled action, but also to show that said plaintiff was at said time a citizen of the State of Washington.

It is further mutually agreed by and between the parties, through their respective counsel that the said amendment may take place at once and without an order of the court to that effect and by interlineation.

HERBERT W. MEYERS,
IVAN L. BLAIR,
Attorneys for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed U. S. Circuit Court, Western District of Washington, May 1, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. SUMMONS.

The State of Washington to Stone & Webster Engineering Corporation, a corporation, the above named defendant:

You are hereby summoned and required to appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled cause in the Circuit Court of the United States for the Western District of Washington, Northern Division, and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorney for plaintiff at his office below named, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said Court, a copy of which is herewith served upon you.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Postoffice Address: 430-433 Pioneer Bldg., Seattle, Wash.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

AMENDED COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one M. J. Whitson as its resident and statutory agent, and as such may sue and be sued in the Courts of the State of Washington.

II.

That the defendant on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by de-

fendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and on which cogs and gears the employees of the defendant were liable to come in contact, while in the performance of their duty as such employees, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employees therefrom.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill, and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's directions as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, his breast torn open so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right

arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant. That the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearing, as is required by the laws of the State of Washington, Section 6587, Rem. & Ball. An. Code, State of Washington.

VII.

That within six months after plaintiff received said injuries, to-wit, on the 19th day of October, 1910, and again on the 2nd day of November, plaintiff gave a notice in writing of the time, place and cause of his said injuries to the defendant corporation through W. J. Whitson, its resident and statutory agent, which notice was signed by Herbert W. Meyers, attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year has not elapsed since the happening of said injuries.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day and by reason of this accident he has lost in wages approximately Two Hundred Sixty-two Dollars ($262.00):

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000.00).

WHEREFORE, plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred Sixty-two Dollars ($12,262.00), together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

ELI MELOVICH, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

His
ELI X MELOVICH,
Mark

Witness: E. Bielich.

Subscribed and sworn to before me this 1st day of May, 1911.

HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of the within Summons and Complaint received and due service of same acknowledged this 1st day of May, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Summons and Amended Complaint. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. ANSWER.

Comes now the defendant Stone & Webster Engineering Corporation and for answer to the amended complaint herein alleges and shows the court.

I.

Answering paragraph two of the amended complaint, this defendant denies said paragraph and each and every allegation therein contained, save and except that the defendant admits that on July 12th, 1910, it was engaged in the erection of a building for a power plant as hereinafter set forth.

II.

Answering paragraph three of said amended complaint, this defendant denies said paragraph and each and every allegation therein contained, save and except that the defendant admits at the time therein referred to it was operating a bucket elevator for the hoisting and handling of certain gravel used in mixing concrete for the construction of a building to be used as a power house.

III.

Answering paragraph four of said amended complaint, this defendant denies said paragraph and each and every allegation therein contained.

IV.

Answering paragraph five of said amended complaint, this defendant admits that on or about the 12th day of July, 1910,

while in its employ, the plaintiff was injured by allowing his right arm to come in contact with certain cog wheels, being a part of the machinery of the gravel elevator, which the plaintiff was then and had been for about three weeks engaged in operating; denies each and every other and remaining allegation in said paragraph five contained and each and every part thereof.

V.

Answering paragraph six of plaintiff's amended complaint, this defendant denies said paragraph and each and every allegation therein contained.

VI.

Answering paragraph seven of the amended complaint, this defendant admits that on or about October 14th, 1910, the plaintiff through his attorney served upon this answering defendant, a purported notice in writing under the Factory Act.

VII.

Answering paragraphs eight and nine of the amended complaint, this defendant denies said paragraphs and each and every allegation therein contained.

Further answering said amended complaint and by way of first affirmative defense thereto this defendant alleges and shows the court:

That on to-wit, July 12th, 1910, this defendant was engaged in the construction of a concrete building situated on the northeasterly side of Snoqualmie River and immediately below Snoqualmie Falls; that situated in a northeasterly direction from said building and about nine hundred feet distant therefrom was a gravel pit, and located about twenty-five feet above the gravel pit was a tramway to which the said gravel was elevated and down the slope of which it was carried by water, which washed the dirt out of the gravel and said gravel was deposited in bunkers from which it was removed to a concrete mixer at the place said concrete power house was being constructed; that at the top of said tramway and immediately above said gravel pit was situated a lift or elevator and that the gravel

was elevated from a point about twenty-five feet below said lift and by bucket running on an endless chain; that this endless chain was operated by said elevator in the construction of which a set of cogs were used; that this elevator was operated by electric power and that for a period of about three weeks prior to the happening of the accident to the plaintiff, he was the motorman employed for the purpose of and engaged in the operating of said elevator, and it was his duty as motorman, not only to operate said elevator, but to keep the shafting, bearings and parts thereof oiled and in running order; that the cog wheels used in said elevator were in plain and open view and that the danger of injury to the plaintiff should he allow the sleeve of his jumper to be caught therein was open, apparent and manifest and well known to the plaintiff; that the plaintiff had entire control of said elevator and that it was not necessary for him to have oiled the shafting about where the cogs were located while said elevator was in operation; that if any danger there was in the oiling of the shafting about the cogs, the plaintiff could have stopped said elevator and oiled any of the bearings without any danger to him whatsoever. That said elevator was an isolated piece of machinery, not connected in any manner with any operating factory or manufacturing plant, but was used as aforesaid solely and exclusively for the purpose of elevating the gravel for the purpose of washing the same and allowing the same to descend along the decline of said tramway for use in the making of concrete for the construction of said power house building. That the manner and method of operating said elevator and the condition thereof and the risk and danger, if any such risk and danger there were incident to the operation of the same, were naturally incident thereto and were all open, apparent and fully understood and appreciated by the plaintiff and were assumed by him as a part of his employment.

For a further, separate and second affirmative defense to the matters and things alleged in the amended complaint, the defendant repeats the allegations contained in the first affirmative defense and further alleges that if any injury or damage was sustained by the plaintiff at the time of his alleged injury set forth in his complaint and in his amended complaint, the

same was caused and contributed to solely by the careless and negligent acts and conduct of the plaintiff himself, and was not caused or contributed to by any careless or negligent acts or conduct on the part of this answering defendant, its agents or employees whatsoever.

WHEREFORE having fully answered, this defendant prays to be dismissed hence with his costs and disbursements herein expended.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. R. Lotz, being first duly sworn, on oath deposes and says: That he is agent of the defendant above named; that he has read the foregoing answer to the amended complaint herein and knows the contents thereof and believes the same to be true.

J. R. LOTZ.

Subscribd and sworn to before me this 2d day of May, A. D. 1911.
(Seal)

J. N. IVEY,
Notary Public in and for the State of Washington, residing at Seattle.

Verification O. K.

HERBERT W. MEYERS,
Attorney for Plaintiff.

May 2, 1911.

Copy of within Answer received and due service of same acknowledged this 2d day of May, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

REPLY.

Comes now plaintiff in the above entitled action and for reply to the affirmative matter set out in the Answer of Defendant herein served, says:

I.

That he denies each and every, all and singular, the allegations contained in paragraphs I, II and III of said Answer.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Copy of within Reply received and due service of same acknowledged this 2d day of May, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

ORDER.

This matter coming on for hearing on the motion of defendant to strike and make more definite,

IT IS ORDERED that plaintiff have leave to file an amended complaint in which will be embodied the points which have been settled by agreement between counsel as to the first six paragraphs of defendant's motion. Paragraph VII of defendant's motion is denied.

DONE in open Court this 1st day of May, A. D. 1911.

GEORGE DONWORTH, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, May 1, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

REPLY.

Comes now plaintiff in the above entitled action and for reply to the affirmative matter set out in the Answer of Defendant herein served, says:

I.

That he denies each and every, all and singular, the allegations contained in paragraphs I and II of said Answer.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Eli Melovich, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

His
ELI X MELOVICH,
Mark

Eli Bielich.

Subscribed and sworn to before me this 3d day of May, 1911.

(Seal) HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, May 5, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. NOTICE TO PRODUCE WRITTEN INSTRUMENT.

To the above named Defendant and Kerr & McCord, Its Attorneys:

You are hereby notified and requested to produce at the trial of the within named action, that certain written letter or notice dated October 14, 1910, signed by the undersigned attorney for plaintiff, addressed to the above named defendant and received by it on the date aforesaid, which said writing gives notice of the time, place and cause of injury to plaintiff as required by the "Factory Act."

Dated September 20, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Due service acknowledged this 21st day of September, 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Notice to Produce Written Instrument. Filed U. S. Circuit Court, Western District of Washington, Sep. 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH, *Plaintiff.*	
vs.	No. 1934.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	PRAECIPE.

To the Clerk of the above Entitled Court:

You will please cause subpoenas to be issued in the above entitled cause for the following witnesses: Sam Marcovich, c/o Stone & Webster, Snoqualmie, Wash., William Savage, 2822 West 73d St., Seattle, Wash., Eugene John Doe Langdon.

HERBERT W. MEYERS,
Atty. for Deft.

Indorsed: Praecipe for Process, etc. Filed U. S. Circuit Court, Western District of Washington, Sep. 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

ORDER APPOINTING INTERPRETER.

Now on this day upon motion of counsel for plaintiff and for sufficient cause appearing, it is ordered that Mrs. May Zeilich be, and she is hereby appointed and duly sworn to act as interpreter during the trial of this cause.

September 28, 1911.

Page 444 Journal—Circuit Court.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*

No. 1934.

PLAINTIFF'S STATEMENT OF THE CASE.

Plaintiff, Eli Melovich, was injured on the 12th day of July, 1910, while working at the plant operated by the defendant corporation near Snoqualmie Falls, King County, Washington, the defendant operating certain concrete mixing machinery and a certain gravel washing machine in the cogs of which the plaintiff had his right arm crushed, necessitating the amputation thereof at a point about two inches from the shoulder, and was confined in the hospital twenty-eight days.

Plaintiff has sued for the loss of his right arm, internal injuries and pains caused by the contact between his chest and said cog wheels. Plaintiff's face was torn open, as was his chest and side. He further claims for pains in his left breast and chest, and asks for $12,262, including $262 for loss in wages.

Plaintiff alleges that defendant failed to furnish him with a safe place in which to work and that defendant operated defective machinery, permitted plaintiff to work around cog wheels unguarded, plaintiff contending that his previous employment had been as a laborer and that he knew nothing of machinery of any kind and had no experience with any sort of machinery, and had never worked around a gravel machine before. That the oiling of the gravel machine on which plaintiff lost his arm was not a part of his duty and that when he was ordered to oil the same he was ordered outside of the scope

of his employment. That the oiling of said gravel machine had been done by plaintiff's former boss and that six or seven days before this accident, the plaintiff's boss was changed and the new boss, Slim Dickey Jackley, did order this plaintiff to oil said machinery. That he had oiled said cogs and wheels only two or three times before he was injured. That the injuries were not due to any carelessness, fault, or negligence on the part of plaintiff, but were due to the indifference, carelessness and gross negligence of defendant corporation.

HERBERT W. MEYERS.

INSTRUCTIONS REQUESTED BY PLAINTIFF

INSTRUCTION NO. 1.

You are instructed that it was the positive duty of the defendant in this case to use ordinary care and prudence in furnishing to the plaintiff before and at the time of the injury complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use all appliances readily attainable known to science for the prevention of accidents, and that, if you find from the evidence that the cogs, wheels, gearings, etcetera, alleged to have caused the injury complained of did, in fact cause the injury, and that they were not so guarded as to render them reasonably certain to avoid injuring workmen employed upon, around or about them, then, and in that event, the said cogs, wheels, gearings, etcetera, were not properly guarded, the place in which the plaintiff was directed to work was not reasonably safe, the defendant did not perform his duty toward the plaintiff, and that the failure of the defendant to perform his duty to the plaintiff in this respect was culpable negligence upon the part of the defendant, for which he is liable.

Ry. v. Ross, 112 U. S. 337 (28-787)
Gardner v. Ry., 150 U. S. 349 (37-1107)
Ry. v. Herbert, 116 U. S. 642 (29-755)
Mather v. Rillston, 156 U. S. 391 (39-464)

Ry. v. McDade, 191 U. S. 64 (48-96)
Archbald, 170 U. S. 665 (42-1188)
Metzler v. McKenzie, 34 Wash. 470
Trump, 94 S. W. 903 (Tex. Civ. App.)
Hansell v. Clark, 214 Ill. 399 (73 N. E. 787)

INSTRUCTION NO. 2

You are instructed that, where a master confers authority upon one of his employes to take charge of and control over a certain class of workmen in carrying on some particular branch or department of his business, such employe in governing and directing the movements of the men under his charge with respect to that branch or department of the business is the direct representative of the master, and orders or commands given by him to the servant under him, respecting the work of the master are, in law, the orders and commands of the master and if the employe in charge and control for the master be guilty of a negligent or wrongful exercise of his power and authority over the men under his charge, it is, in law, the same as though the master was guilty of negligence.

Brickwood, Sacket Instructions, 1439
R. R. v. Dwyer, 162 Ill. 482 (44 N. E. 815)
Steel Co. v. Hansen, 97 Ill. App. 469 (62 N. E. 918)
R. Co. v. Dixon, 194 U. S. 338 (48 L. Ed. 1006)
R. Co. v. Peterson, 162 U. S. 346 (40 L. Ed. 994)
Baugh, 149 U. S. 368 (37 L. Ed. 772)
Hambly, 154 U. S. 349 (38 L. Ed. 1009)
Keegan, 160 U. S. 259 (40 L. Ed. 418)
Conroy, 175 U. S. 323 (44 L. Ed. 181)

INSTRUCTION NO. 3

The court instructs the jury that, where a person in the employ of another in the performance of a specific line of duty, only ordinarily hazardous, is commanded by another servant, to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, extra hazardous in its nature and outside of the scope of the employ-

ment for which he had been engaged in respect to which the servant giving the order knew or should have known he was unskilled and inexperienced, and in doing the act the servant so directed receives injuries occasioned by the negligence of the employer or of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured, and the jury will so find.

Ry. v. Fort, 17 Wall. 553 (21-739)
Hough v. Ry., 100 U. S. 213 (25-612)
Ry. v. Peterson, 162 U. S. 346 (40-994)
Charles, 162 U. S. 359 (40-999)
Conroy, 175 U. S. 323 (44-181)
Baugh, 149 U. S. 368 (37-772)
Herbert, 116 U. S. 642 (29-775)
Martin v. Ry. 166 U. S. 399 (41-1051)
SS. Co. v. Merchant, 133 U. S. 375 (33-656)
Ry. v. Holmes, 202 U. S. 438 (50-1094)

INSTRUCTION NO. 4.

You are instructed that an employe assumes only the ordinary risks incident to the service for which he is engaged, and that he does not assume the risks of the negligence of the employer; that an employe has the right to presume that the employer has not neglected to perform his duty toward him and has used due care to provide him a reasonably safe place in which to work, has procured and is using all appliances readily attainable known to science for the prevention of accidents and has furnished reasonably safe and suitable machinery, tools and other instrumentalities for his use; that, if you find from the evidence that the plaintiff was injured and that his injury was due to the failure of the defendant to provide a reasonably safe place in which for him to work, together with reasonably safe and suitable machinery, tools and other instrumentalities, guarded by all appliances readily attainable known to science for the prevention of accidents, then, and in

that event, the plaintiff did not assume the risk of injury while so employed.

(1) *Hough v. Ry.* 100 U. S. 213 (25-612)
Ry. v. McDaniel, 107 U. S. 454 (27-605)
Herbert, 116 U. S. 642 (29-755)
Babcock, 154 U. S. 190 (38-958)
McDade, 191 U. S. 64 (48-96)
O'Brien, 161 U. S. 454 (40-766)
(2) *Ry. v. Ross,* 112 U. S. 377 (28-787)
Tuttle v. Ry. 122 U. S. 189 (30-1114)
Ry. v. Archibald, 170 U. S. 665 (42-1188)
Schlemmer v. R. 205 U. S. 1 (51-681)
Kohn v. McNulty, 147 U. S. 238 (37-150)
(3) *Ry. v. Swearenger,* 196 U. S. 51 (49-382)
Archibald (2)
Herbert (1)
Jarvi, 53 Fed. 65
(4) *McDade* (1)
Mather v. Rillston, 156 U. S. 391 (39-464)
(5) *Gardner v. Ry.* 150 U. S. 349 (37-1107)
Ry. v. McDade, 135 U. S. 554 (34-235)
Hough (1)
Patton v. Ry. 179 U. S. 658 (45-361)
O'Brien (1)
McDade (1)
Archibald (2)
Peterson, 162 U. S. 346 (40-994)
Babcock (1)
Ross (2)
(6) *Ross* (2)
Mather v. Rillston (4)
Jarvi (3)

INSTRUCTION NO. 5.

If you believe, from the evidence, that plaintiff has been injured permanently and his earning capacity impaired by reason thereof, and you award him damages therefor, as is your right, you may refer to certain approved mortality tables

showing the life expectancy of persons of various ages, in order to ascertain the probable number of years the plaintiff, at the time of the injury to him, was expected to live, which in the case of this plaintiff is thirty-five and thirty-three hundredths years, and you are authorized to award to him, because of the damage he has suffered from the impairment of his earning capacity, if any, regardless of any other item of damage, such a sum as would, with interest at the rate of six per cent per annum during the period of his life expectancy, at the end of the period of his life expectancy, as shown by the table, equal in amount the full sum he might reasonably be presumed to have lost in earnings and income during his life, as a result of the injury. In determining the amount which he may reasonably be presumed to lose because of the impairment of his earning capacity, consideration may properly be given to the decrease in the earning capacity of the plaintiff during the later years of his life, due to old age, sickness and other possible causes. But consideration should be given also to the probably increase in the earning capacity of the plaintiff by reason of additional experience and increased efficiency in his line of business. While the jury may employ the mortality tables and the suggestions here made by the court in arriving at a verdict, it must be understood that they are not conclusive upon the jury and they may use other means in determining their verdict, but in no event can damages be awarded in excess of the amount named in the complaint.

Dunbar v. Dunbar, 190 U. S. 340 (47 L. Ed. 1084)
R. R. v. Putnam, 118 U. S. 545 (30 L. Ed. 257)
R. R. v. Elliott, 149 U. S. 266 (37 L. Ed. 728)
R. R. v. Putnam, 118 U. S. 545 (30 L. Ed. 257)

INSTRUCTION NO. 6.

If you find from the evidence, that the injuries occurred by reason of any negligence on the part of the company, then the plaintiff is entitled to recover, unless it affirmatively appears by a preponderance of evidence on that point that he was himself guilty of such negligence as to be a proximate cause of the injuries he suffered. In determining the exist-

ence of contributory negligence, you should not hold the plaintiff liable for faults due to the want of capacity or intelligence to realize and appreciate what is and what is not, negligence. You should require him to have exercised only such faculties and capacities as he is endowed with by nature for the avoidance of danger. The question of contributory negligence on the part of the plaintiff is a matter of defense and admits or presupposes negligence on the part of the defendant, and the company must establish the fact of such negligence on the part of the plaintiff by a fair preponderance of evidence. If you find the evidence on the question of contributory negligence is equally balanced, then upon that question you would have to find for the plaintiff. The fact of contributory negligence is never presumed, but must be proved.

Railroad Co. v. Cumberland, 176 U. S. 232 (44 L. Ed. 447)

INSTRUCTION NO. 7.

The court instructs the jury that, if they find for the plaintiff, and award him damages, they will assess compensatory damages only, which means a fair and reasonable compensation for all injuries, past and prospective, bodily and mental, consequent upon the injury (1), consideration being given to the age and condition in life of the plaintiff, his earning capacity and the impairment thereof, his physical and mental suffering and pain already endured and such as he may reasonably be expected to endure in the future as a consequence of the injury (2), the value of the time lost by him (3), the expense shown to have been incurred by him for hospital, surgical and medical treatment and attention (4), the permanent disfigurement of his person, the permanent injury to his health by reason of the injury, the nature of the injury—whether it be permanent or not, and the probable sum total of the earnings lost, or to be lost, by him during the balance of his life because of the impairment of his earning capacity in consequence of the injury and its permanency, if permanent, as well as all other elements of damage which have resulted or

are reasonably certain to result in the future by reason of the injury, if any, you have found he has sustained.

(1) *Pierce v. Ry.*, 173 U. S. 1 (43-591)
Ry. v. Putnam, 118 U. S. 545 (30-257)
Kennon v. Gilmore, 131 U. S. 22 (33-110)
District v. Woodbury, 136 U. S. 450 (34-472)
(2) *McDermott v. Severe*, 202 U. S. 600 (50-1162)
Ry. v. Harmon, 147 U. S. 571 (37-284)
(3) *Beckwith v. Dean*, 98 U. S. 266 (25-124)
Ry. v. Putnam, 118 U. S. 545 (30-287)
(4) *Ry. v. Putnam* (3)
Pierce v. Ry. (1)
Kennon v. Gilmore (1)
Beckwith v. Dean (3)
Wade v. Leroy, 20 How. 34 (15-124)
(5) *Ry. v. Barron*, 5 Wall. 90 (18-591)
(6) *Pierce v. Ry.* (1)
Ry. v. Putnam (1)
Wade v. Leroy (4)
Neb. City v. Campbell, 2 Black. 590 (17-271)

INSTRUCTION NO. 8.

The court instructs the jury that, if they find from the evidence, that the company neglected to perform its duty to its employes in the matter of providing them a reasonably safe place and reasonably safe and suitable machinery, tools and other instrumentalities in and with which to perform their duties, and that such neglect on the part of the company was one of the proximate causes of the injury, suffered by the plaintiff, the fact that the plaintiff received the injury complained of while performing a duty in obedience to an order and command of another employe of the company, who had power and authority to direct and govern the plaintiff, did not relieve the company of liability for injuries sustained through and by reason of such neglect of the company to perform its duty to its employes.

Mining Co. v. Fulton, 205 U. S. 60 (51 L. Ed. 708)
Ry. v. Lyon, 203 U. S. 465 (51 L. Ed. 276)
Ry. v. Cummings, 106 U. S. 700 (27 L. Ed. 266)

INSTRUCTION NO. 9.

This being a civil action, the jury are instructed that the question involved should be determined by the preponderance of the evidence (1), and that by preponderance is not meant the greater number of witnesses testifying for either party, but, instead the relative merit and weight of the evidence, taken as a whole, which is proved by either party (2). You should consider all of the evidence and all of the facts and circumstances proved on the trial, giving to the several parts of the evidence, and to the testimony of the witnesses, such weight as you believe they are entitled to. In arriving at the weight to be given to the testimony of the several witnesses, you should take into consideration whatever interest they have in the suit, if any, their appearance, conduct and demeanor while testifying, their apparent bias in favor of either party and the reason for it, if any, the reasonableness of the testimony given by each, and all of the circumstances which go to corroborate or to contradict witnesses, if any such are proved (3). If, upon consideration of the evidence and all of the facts and circumstances, you should find that the evidence was evenly balanced, then, and in that event, your finding should be for the plaintiff (4).

(1) Greenl. Ev. S. 29 (14th Ed.)
Lilenthal v. U. S. 97 U. S. 237 (24-901)

(2) *Brown v. People*, 65 Ill. App. 58

(3) *Evans v. Lipscomb*, 31 Ga. 71
French v. Millard, 2 Ohio St. 44
Sellar v. Clelland, 2 Colo. 539
Richardson v. Boynton, 38 Neb. 288 (56 N. W. 886)
Dodge v. Reynolds, 135 Mich. 692 (98 N. W. 737)

(4) 2 *Whart.* Ev. S. 1245
Gordon v. Parmelee, 15 Gray 415
Lilienthal v. U. S. (1)

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.
No. 1934.

PLAINTIFF REQUESTS THAT THE FOLLOWING INSTRUCTIONS BE GIVEN TO THE JURY.

HERBERT W. MEYERS.

INSTRUCTION NO. —.

If you find from the evidence, that the injuries occurred by reason of negligence on the part of the corporation as set forth in the complaint, then the plaintiff is entitled to recover, unless it affirmatively appears by a preponderance of the evidence on that point that he himself was guilty of such negligence as to be a contributing cause of the injuries he suffered. In determining the existence of contributory negligence, you should not hold the plaintiff liable for faults due to the want of capacity or intelligence to realize and appreciate what is and what is not dangerous. You should require him to have exercised only such faculties and capacities as he is endowed with by nature for the avoidance of danger. The question of contributory negligence on the part of the plaintiff is a matter of defense and admits or presupposes negligence on the part of the defendant corporation and the defendant corporation must establish the fact of such negligence on the part of the plaintiff by a fair preponderance of the evidence. If you find the evidence on the question of contributory negligence is equally balanced, then upon that question you would have to find for

the plaintiff Melovich. The fact of contributory negligence is never presumed, but must be proved.

Railroad Co. v. Cumberland, 176 U. S. 232 (44 L. Ed. 447)

INSTRUCTION NO. —.

It is the duty of an employer operating machinery or other dangerous agencies and employing others to assist him to exercise the same degree of care for the safety of his workmen and employes that an intelligent person of ordinary prudence and caution does habitually exercise for his own safety, and the failure of an employer to exercise such care to provide a reasonably safe place and surroundings for his employes to work in is a neglect of duty constituting a legal wrong, and when an employe suffers injury in consequence of the failure of the employer to provide such reasonably safe place and surroundings, the employer is liable to such employe in damages on the principle that he should render compensation in consequence of his wrongful act. The word "reasonable" when used in this connection is a qualifying term that has to be applied, and it devolves on the jury to exercise their reasoning faculties to determine what was reasonable in the particular instance.

INSTRUCTION NO. —.

I instruct you that it is the duty of a master to furnish a reasonably safe place for his servants to work (1), and to provide reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done (2), and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty (3). If instead of personally performing these duties the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such (4). The employe has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others,

that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. The liability does not depend upon the grade of service of a co-employe, but upon the character of the act itself, and a breach of the positive obligation of the master (5).

(1) *R. R. v. Holmes*, 202 U. S. 438 (50-1094)
Hough v. R. R. Co. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
R. R. v. Baugh, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
(2) *R. R. v. Baugh*, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
(3) *R. R. v. Baugh*, 149, U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
(4) *R. R. v. Peterson*, 162 U. S. 346 (40-994)
R. R. v. Charles, 162 U. S. 359 (40-999)
R. R. v. Conroy, 175 U. S. 323 (44-181)
R. R. v. Baugh, 149 U. S. 368 (37-772)
Hough v. R. R. 100 U. S. 213 (25-612)
Gardner v. R. R. 150 U. S. 349 (37-1107)
R. R. v. Daniels, 152 U. S. 684 (38-597)
(5) *R. R. v. Daniels*, 152 U. S. 684 (38-597)
R. R. v. Baugh, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)

INSTRUCTION NO. —.

An employe does not assume the risks of the employer's negligence (1), and has a right to presume that the employer has not neglected to perform his duty toward him in the matter of using reasonable care to provide him a reasonably safe place in which to work and in using the necessary approved

appliances for the prevention of accidents and has furnished reasonably safe and suitable machinery, tools and other instrumentalities for his use (2). If you find from the evidence in this case that the plaintiff was injured and that his injury was in consequence of the failure of the defendant corporation to provide such reasonably safe place in which for him to work, and reasonably safe and suitable machinery, tools and other instrumentalities so safeguarded as to be reasonably certain to prevent accidents, then, and in that event, the plaintiff did not assume the risk of injury while so employed.

Only the dangers obvious to a man of his intelligence and dangers of which he has actual knowledge, incident to his employment, are assumed by the employe. The employe is not required by the law to assume the risk of dangers which he does not know of—he is not required to search for dangers, but he is required to observe dangers ordinarily open to observation when exercising the degree of vigilance that a person of his natural capacity, his degree of intelligence, his experience with machinery would exercise, and he is chargeable only with the assumption of risk of those dangers that would necessarily be apparent to a man of his intelligence and capacity.

(1) *R. R. v. O'Brien*, 161 U. S. 451 (40-766)
R. R. v. McDade, 191 U. S. 64 (48-96)
(2) *R. R. v. Swearingen*, 196 U. S. 51 (49-382)
R. R. v. Archbold, 170 U. S. 665 (42-1188)
R. R. v. McDade, 191 U. S. 64 (48-96)

INSTRUCTION NO. —.

The plaintiff has set forth in his complaint an allegation that the place in which he was working at the time of the injury to him was not a safe place, and, being a question of fact, it is for the jury to determine from the evidence whether or not the place where the plaintiff was working when injured was a reasonably safe place for the performance of the work to be done there—a reasonably safe place considering the character of the premises. If you find that it was not reasonably safe, and the negligence of the defendant corporation in not making it reasonably safe contributed to the happening of the

accident, then the defendant corporation is liable, provided the plaintiff himself was not guilty of negligence which contributed to the accident.

Ry. Co. v. Lyon, 203 U. S. 465 (51-276)

INSTRUCTION NO. —.

You should consider all of the evidence and all of the facts and circumstances proved on the trial, giving to the several parts of the evidence, and to the testimony of the witnesses, such weight as you believe they are entitled to. In arriving at the weight to be given to the testimony of the several witnesses, you should take into consideration whatever interest they have in the suit, if any, their appearance, conduct and demeanor while testifying, their apparent bias in favor of either party and the reason for it, if any, the reasonableness of the testimony given by each, and all of the circumstances which go to corroborate or to contradict witnesses, if any such are proved. If, upon consideration of the evidence and all of the facts and circumstances, you should find that the evidence was evenly balanced, then, and in that event, your finding should be for the plaintiff.

INSTRUCTION NO. —.

You are the sole and exclusive judges of the evidence in this cause, of the credibility of the several witnesses, and of the degree of weight to be attached to the testimony of such witnesses. In considering the testimony of any witness, you may consider the apparent fairness and candor or lack thereof of such witness, his apparent bias or lack thereof, the interest or lack of interest, if any, which you may believe such witness has or feels in the result of your verdict, the reasonableness or unreasonableness of the story which witness relates, the opportunities for knowing the facts whereof such witness testifies, and give to such testimony of any witness such weight as in your judgment it may be entitled to. You must be slow to believe any witness has testified falsely, but if you are satisfied that any witness has testified falsely to any material matter, you are then at liberty to disregard the testimony of such

witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

INSTRUCTION NO. —.

The Court instructs the jury that, if they find for the plaintiff, and award him damages, they will assess compensatory damages which means a fair and reasonable compensation for all injuries, past and prospective, bodily and mental, consequent upon the injury (1), consideration being given to the age and condition in life of the plaintiff, his earning capacity and the impairment thereof, his physical and mental suffering, his mental anguish when contemplating his permanently crippled condition, if you find him so crippled, the pain already endured and such as he may reasonably be expected to endure in the future as a consequence of the injury (2), the value of the time lost by him (3), the expense shown to have been incurred by him for hospital, surgical and medical treatment and attendance (4), the permanent disfigurement of his person, the permanent injury to his health by reason of the injury (5), the nature of the injury—whether it be permanent or not, and the probable sum total of the earnings lost, or to be lost, by him during the balance of his life because of the impairment of his earning capacity in consequence of the injury and its permanency, if permanent (6).

(1) *Pierce v. Ry.* 173 U. S. 1 (43-591)
Ry. v. Putnam, 118 U. S. 545 (30-257)
Kennon v. Gilmore, 131 U. S. 22 (33-110)
District v. Woodbury, 136 U. S. 450 (34-472)
(2) *McDermott v. Severe*, 202 U. S. 600 (50-1162)
Ry. v. Harmon, 147 U. S. 571 (37-284)
(3) *Beckwith v. Dean*, 98 U. S. 266 (25-124)
Ry. v. Putnam, 118 U. S. 545 (30-287)
(4) *Ry. v. Putnam* (3)
Pierce v. Ry. (1)
Kennon v. Gilmore (1)
Beckwith v. Dean (3)
Wade v. Leroy, 20 How. 34 (15-124)
(5) *Ry. v. Barron*, 5 Wall. 90 (18-591)

(6) *Pierce v. Ry.* (1)
Ry. v. Putnam (1)
Wade v. Leroy (4)
Neb. City v. Campbell, 2 Black, 590 (17-271)

INSTRUCTION NO. —.

The Court will take judicial notice of the mortuary tables and the fact that plaintiff Melovich had a life expectancy of 35.33 years at the time he was injured, and as the uncontradicted testimony shows that at the time of his injury, he was making $3.00 a day, if you find for the plaintiff Melovich, you are entitled to award him such sum in keeping with the other instructions which I have given you, as he would have made during the period of his expectancy of 35 and a fraction years, had he not been injured, minus such sum as you, in your judgment from the testimony you have heard, believe that he should make during his said expectancy, not to exceed in all the sum of the plaintiff's claim of $12,262.

INSTRUCTION NO. —.

I charge you that if the servant is injured in a moment of forgetfulness, while in the discharge of his duties, and owing to the haste required to perform such duties, he momentarily forgets such danger and in such moment of forgetfulness is injured, that does not in law preclude recovery. That is, the minute that fact appears, it is not proper for law to say, you cannot recover because you knew of the danger and you forgot it. That is a fact and circumstances which you may take into consideration with all the other facts and circumstances in determining the character of the danger and determining the question whether or not the servant was guilty of negligence.

Passage v. Stimson Mill Co., 10 Wash. Dec. 492, 101. p. 239

King v. Griffiths-Sprague, etc., 45 Was. 425, 88 Pac. 759

Hoff v. Jap-Am. Fet. & Fish Co., 48 Wash. 581, 94 Pac. 109

Hall v. West & Slade Mill Co., 39 Wash. 447.

Bush v. Ind. Mill Co., 12 Wash. Dec. p. 1, 103 P. 45

INSTRUCTIONS REQUESTED BY PLAINTIFF

INSTRUCTION NO. —.

Certain evidence has been introduced in the course of this trial from which the jury might readily infer that guards were placed about the cog wheels which are alleged to have caused the injury, soon after the accident occurred. In his complaint, the plaintiff Melovich, alleges that the cog wheels in question were operated without guards about them, and the defendant corporation admits that the cog wheels were not guarded at the time of the accident. I instruct you that the fact that the defendant placed guards about the cog wheels after the accident occurred is not of itself to be taken as indicating negligence on the part of the defendant corporation in not guarding the cog wheels prior to the accident, and you should eliminate the fact of the placing of guards about the cog wheels after the accident, and consider the matter in the light of the admitted condition of the machine at the time of the accident, arriving at your conclusion with respect to the defendant corporation's negligence in not guarding the cog wheels, as alleged in the complaint in this case, or its want of negligence, by consideration of all other evidence introduced during the trial.

Plaintiff requests.

HERBERT W. MEYERS,
Atty. for Pltf.

In the United States Circuit Court for the District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

INSTRUCTIONS REQUESTED BY DEFENDANT.

The defendant respectfully requests the Court to instruct the jury as follows:

INSTRUCTION NO. 1.

The plaintiff is thirty years of age, and testified in this case that he had oiled the washing machine on two or three occasions prior to the time he was oiling it when he was injured. He also testified that the cog wheels by which he was caught were in plain view; that he had oiled them when the washer was being operated, and that he knew that he would be injured if his hands came in contact with them. Under these circumstances I instruct you that no warning or caution could have increased his knowledge of the danger or necessity for care. With the knowledge the plaintiff has admitted he possessed, I instruct you that he assumed the risk of the injury he received, and that he cannot recover.

Bier v. Hosford, 35 Wash. 544.
Greef v. Brown, 51 Pac. 926.
Leubke v. Machine Works, 60 N. W. 711.
French v. R. R., 24 Wash. 83.

II.

A person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defect or unguarded part, if injured thereby, cannot recover:

Crooker v. Pacific Co., 34 Wn. 191.

III.

While it is a rule of law that the employer must furnish the employe with a safe place to work, it is just as well established that the employe assumes the risks of apparent peril. Where the danger is obvious and the servant is ordered by the master to work in a given place, it is the duty of the servant to disobey orders of that nature, and if he does not do so, but voluntarily exposes himself to such danger and is injured he cannot recover:

Bier v. Hosford, 35 Wn. 552-3.

IV.

"A person employed to work about dangerous machinery assumes the risk of all dangers which are obvious, and cannot recover for injuries sustained, although the master failed to instruct the servant regarding his duties connected with the operation of such machinery, and the dangers of his employment in that behalf; the washer which plaintiff in this case was oiling when injured "was dangerous only because there was danger in oiling it, and if it was in fact dangerous it is immaterial that the danger might have been averted by appliances protecting it. If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have protected the danger by guarding against it:"

Oleson v. Lumber Co., 9 Wn. 502; 35 Wn. 555.
Gilbert v. Guild, 144 Mass. 601.

V.

The plaintiff testified that he undertook on some occasions to oil the washing machine prior to his injury; that he knew of the existence of the cog wheels and had oiled them when in motion; that if caught in them he would be injured. He does not claim that he made any complaint. I instruct you that when he assumed the work of oiling this machinery he at the same time assumed the risk of injury on the cog wheels:

Oleson v. Lumber Co., 9 Wn. 502.

VI.

You are instructed that it is the duty of employes to use their senses, and when a workman knows or on the reasonable exercise of his faculties should know the dangers which surround him, he must be held to have assumed the risk:

McDonald v. Ry., 31 Wn. 585.

VII.

I instruct you that as a matter of law an employe assumes the risk from defective appliances furnished by his employer when the defect is known to him or plainly observable by him:

R. R. v. McDade, 191 U. S. 64.
R. R. v. Halloway, 191 U. S. 338.
R. R. v. Swearingen, 196 U. S. 62.

If you find that the plaintiff knew the cogs were not guarded, and knew or in the exercise of his senses ought to have known that he would be injured if his clothing should be caught on them, and with this knowledge undertook to oil the washer, he assumed the risk and cannot recover.

R. R. Co. v. McDade, 135 U. S. 554, citing 152 U. S. 153, etc.

VIII.

The employe is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employe or it is so patent as to be readily observed by him he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incidental to such situation. In other words, if he knows the defect, or it is so plainly observable that he may be *presumed* to know of it, and continues in the master's employ without objection, he is taken to have made his election, notwithstanding the defect, and in such case cannot recover:

Co. v. McDade, 24 Sup. Ct. Rep. 24.

IX.

If you find from the evidence in this case that plaintiff knew of the existence of the cog wheels on defendant's gravel washing machine at the time he undertook to oil the machinery, and if you further find that by the exercise of due care the plaintiff could have oiled the bearings of said washer without coming in contact with the cog wheels, and that he failed and neglected to use due care in the performance of that duty, and that he negligently reached over the face of the cog, thereby permitting the sleeve of his jumper to come in contact therewith, by reason of which he sustained injury, I instruct you that he was guilty of such contributory negligence that he cannot recover.

X.

The plaintiff Melovich admitted in his cross-examination that he knew the cog wheels in which he alleges that he was caught were uncovered; that if his hands were permitted to come in contact with them while in motion he would be injured; he is not complaining that the danger therefrom was hidden and that he was not warned of it by defendant.

The law is that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects, and plain or apparent dangers from them which he knows or appreciates, or which an employe of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate, assumes the risks of these dangers and cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts, no case arises in his favor. You are accordingly instructed that if you find that plaintiff knew the danger of coming in contact with the cog wheels, or by the exercise of ordinary care and prudence ought to have known it, he cannot recover.

126 F. 511.

XI.

I instruct you that the defendant is not guilty of negligence in not guarding the cog wheels in which plaintiff alleges he was caught.

XII.

The plaintiff in this case is a grown man, and while he claims he had not worked for any length of time about machinery, I instruct you as a matter of law that he is charged with knowledge that the unguarded cogs were dangerous should he allow himself to come in contact therewith.

Plaintiff has charged two grounds of negligence—first, that the defendant failed to furnish the plaintiff a safe place in which to work .Second—that the defendant failed to guard the cog wheels of the machine upon which the plaintiff was injured.

As to the second ground of negligence charged in the complaint, I instruct you that the failure to furnish a guard to the cog wheels in question does not raise a presumption of negligence on the part of the defendant and is not negligence. If the place furnished by the defendant for the plaintiff to work in was reasonably safe without a guard, there was no duty on the part of the defendant to provide or furnish such guard, and the absence and such guard over the cog wheels can only be considered by you as bearing on the question of the safety of the place in which plaintiff was working when injured.

The complaint in this action was drafted in part upon the theory that the defendant was required by the statutes of this State to supply a guard over the cog wheels in question. There is a law in this State which requires the owners of factories, mills, etc., to guard all dangerous machinery that can be practicably guarded with due regard to the successful operation of the machinery—but the scope of such law is limited to factories, mills and manufacturing plants and has no application to this case, and you will disregard all allegations of the complaint and all evidence that has been introduced from which you might infer that it was the duty of the defendant to guard the cog wheels in question. The law requiring machinery in factories to be guarded has nothing to do with this case. The plaintiff has expressly stated that he was not proceeding upon that theory.

If you find from the evidence in this case that the plaintiff is a man of ordinary intelligence; that he possesses the ordinary

faculties of an adult who has a sound mind and body; that his eyesight was uninjured, and that he could see and observe the revolving cog wheels, and that he knew, or might have known that he would be injured if he came in contact with the cogs—that he understood and appreciated the danger of being brought in contact with the revolving cog wheels, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant, even though you should reach the conclusion from your deliberations that the defendant was negligent in not furnishing the plaintiff a safe place in which to work. Even the risk of negligent acts of the defendant were assumed by the plaintiff if he understood and appreciated the dangers that might result to him from such negligent acts of the defendant, if you find there were any such negligent acts.

If you find from the evidence that the plaintiff in this case was a man of fair average intelligence, in possession of an unimpaired eyesight, and that the cog wheels upon which he was injured were visible to him, or that by the use of his eyesight he could have seen the cog wheels, then I instruct you that you have a right to presume that the plaintiff must have known and observed the danger to him if he permitted his clothing to come in contact with the revolving cog wheels and your verdict must be for the defendant.

"The employer performs his duty when he furnishes appliances and machinery of ordinary character and reasonable safety, and the former is a test of the latter, for in regard to the style of the machinery or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits and ordinary risks of the business. No man is held by law to a higher degree of skill.

"The employer performs his duty when he furnishes appliances and machinery of ordinary character and reasonable safety, and the former is the test of the latter—for in regard to the style of the machinery or nature of the mode of performance of any work 'reasonably safe' means safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers.

They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a community."

1 Labatt, Sec. 44.

And if you find from the evidence in this case that it was not customary at the time of this injury for guards to be placed over cog wheels situated similarly to those on the machine where this injury occurred, then I instruct you that you are not to infer that the defendant was guilty of any negligence in failing to provide a guard for the cog wheels in question; and you will not infer that the defendant was guilty of any negligence from any evidence that may have been introduced tending to show that some safer means of operating the machine could have been adopted, or that a guard might have been placed over the cog wheels. If the cog wheels on the machine in question were operated by the defendant in the usual way in which similar machines are operated in this community, then I instruct you that the plaintiff cannot recover and your verdict must be for the defendant.

"To leave gearings, cogs and other parts of machinery unboxed is not negligence where other manufacturers or operators in the same line of business operate their machinery in the same manner."

1 Labatt, Sec. 77.

Indorsed: Instructions Requested by Defendant.

In the Circuit Court of the United States for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CO.,
Defendant.

No. 1934

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at twelve thousand two hundred and sixty-two dollars ($12,262.00).

L. T. DODGE, Foreman.

Indorsed: Verdict. Filed U. S. Circuit Court, Western District of Washington, Sept. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

To the Stone & Webster Engineering Corporation, and to Kerr & McCord, their Attorneys:

You and each of you will please take notice that the plaintiff, by his attorney, Herbert W. Meyers, will on Tuesday morning, October 3rd, at 10 a. m., ask the Clerk of the United States Circuit Court to tax his costs in the above entitled cause in accordance with the cost bill attached hereto.

HERBERT W. MEYERS,
Attorney for Plaintiff.
M.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MEMORANDUM OF COSTS AND DISBURSEMENTS.

DISBURSEMENTS.

Clerk's fees to be taxed	$ 13.10	$ 13.10
Service fees		
Serving subpoena on Mele Melovich, Snoqualmie Falls, Wn.	6.80	6.80
Serving Subpoena on William Savage, Seattle, Wash.	2.12	2.12
Serving subpoena on Sam Marcovich, Seattle, Wash.	2.12	2.12
Attorney's fees	20.00	20.00
Reporter's fees	10.00	10.00
Witness fees—		
Mele Melovich, 3 days	9.00	9.00
Mele Melovich, mileage, 136 miles, Snoqualmie Falls to Seattle	6.80	6.80
William Savage, 3 days	9.00	9.00
Sam Marcovich, 3 days	9.00	9.00
Sam Marcovich, mileage, 136 miles, Snoqualmie Falls to Seattle	6.80	6.80
Mrs. Eli Bielich, interpreter	9.00	9.00
	$103.74	$103.74

United States of America,
Western District of Washington—ss.

Herbert W. Meyers, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause, and that the services charged herein have been actually and necessarily performed as herein stated.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 2nd day of October, 1911.

(Seal) JAMES E. McGREW,
Notary Public in and for the State of Washington, residing at Seattle.

Taxed Oct. 5, 1911.

B. O. WRIGHT, Deputy Clerk.

Service acknowledged this 2d day of October, 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Memorandum of Costs and Disbursements. Filed U. S. Circuit Court, Western District of Washington, Oct. 3, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER and STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendants.

No. 1934.

Order.

This cause coming on to be heard on the application of Kerr & McCord, attorneys for defendants, for an extension of time within which to file in this Court defendants' proposed bill of exceptions, and it being made to appear to the Court that it is impossible for the defendants to procure a transcript of the testimony taken at the trial of cause within the period of ten (10) days from the date of said trial and rendition of the verdict therein, which is necessary to enable the defendants to prepare their bill of exceptions;

IT IS NOW BY THE COURT ORDERED that the time for filing the bill of exceptions herein be extended and defendants are hereby granted until October 20, 1911, within which to prepare, serve and file their proposed bill of exceptions.

DONE in open Court this 4th day of October, A. D. 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Oct. 4, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Judgment.

BE IT REMEMBERED that this cause came duly on for trial on the 27th day of September, 1911, and the same was continued until September 28th, and said trial proceeded until and including the 29th day of September, 1911.

Plaintiff appeared in person and by Herbert W. Meyers, his attorney, and defendant appeared by Kerr & McCord, its attorneys; thereupon a jury of twelve good and lawful men of the district was empaneled and sworn, and the plaintiff introduced his testimony and rested, and defendant introduced its testimony and rested; the cause was argued to the jury by counsel upon either side and the jury was charged upon the law of the case by the Court, and thereupon retired in charge of a sworn bailiff, to consider its verdict, and said jury, after duly considering the same, did on the 29th day of September, 1911, return its verdict wherein and whereby it did find in favor of plaintiff and against the defendant, and assessed plaintiff's damage in the sum of $12,262.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from defendant, judgment in the sum of $12,262 and for his costs and disbursements hereinafter to be taxed, for all of which let execution issue.

DONE IN OPEN COURT this 4th day of October, 1911.

C. H. HANFORD, Judge.

O. K. as to form.

KERR & McCORD.

Indorsed: Judgment. Filed U. S. Circuit Court, Western District of Washington, Oct. 4, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Complainant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MOTION TO SET ASIDE JUDGMENT.

Comes now the defendant, by its attorneys, Kerr & McCord, and moves the Court to set aside the judgment heretofore entered in this cause on the verdict of the jury, and for judgment against the plaintiff notwithstanding the verdict, upon the grounds following:

1. That upon the undisputed testimony in said cause the plaintiff assumed the risk of the injury of which he complained, and cannot recover.

2. Upon the undisputed testimony admitted in said cause, the plaintiff was guilty of contributory negligence which resulted in his injury, and for that reason cannot recover.

3. And for the reason that the verdict of the jury was contrary to the evidence, against the evidence, and is wholly unsupported by the testimony in said cause.

And in the alternative and in the event the foregoing motion for judgment notwithstanding the verdict shall be by the Court denied, defendant respectfully moves and petitions the Court to set aside the judgment entered in this cause upon the verdict of the jury, and to grant to defendant a new trial upon the following grounds and for the following reasons:

1. That the verdict of the jury is not sustained by sufficient evidence.

2. There was no testimony tending to sustain the verdict.

3. Said verdict was contrary to law.

4. The Court erred in refusing to grant the defendant's motion for non-suit and for a dismissal of said cause upon the undisputed evidence that plaintiff assumed the risk of the injury he received, and upon the further ground and undisputed testimony plaintiff was himself guilty of such contributory negligence that he could not recover.

5. The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 1, namely, that upon the allegation of plaintiff's complaint and upon his testimony in the cause, it was not the duty of the defendant to warn him of the danger which was apparent and which he testified he knew, and that he had assumed the risk and could not recover.

6. The Court erred in refusing to instruct the jury as requested by the defendant in its second requested instruction, namely, that if a person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defective or unguarded part, is injured thereby, he cannot recover.

7. The Court erred in refusing to instruct the jury as requested by the defendant in its requested instructions Nos. 3, 4, 5, 6, 7, 8 and 9.

8. The Court erred in permitting the plaintiff's witness Savage, over the objection of defendant's counsel, to testify that he had placed guards upon the cog wheels of the motor that the plaintiff was operating, and further, in permitting said witness Savage to testify over the objections of defendant's counsel that guards could have been put upon the cog wheels upon which the plaintiff was injured, to which ruling exception was duly taken at the time.

9. That in support of the first ground for motion for new trial based upon the insufficiency of the evidence, and in compliance with the rule of this Court, counsel for the defendant specifies the particulars wherein said evidence is insufficient, as follows:

1. It is alleged by plaintiff in his amended bill of complaint that plaintiff on and prior to the date of his injury was ordered by the foreman or superintendent, acting for the

defendant corporation, to oil said cogs and gears while the same were in motion, and that the plaintiff, while exercising due care and without fault or negligence on his part, attempted to oil said cogs and gears while in motion, in obedience to defendant's direction, and that he came in contact with said cogs and gears and had his right arm caught therein and received the injury of which he complains, and that he had done said oiling about four or five times prior to the happening of the accident, and plaintiff testified as a witness in his own behalf that he had oiled the cogs and gears on several occasions prior to the accident. That when oiling them he had stood on a platform in front of the wheels and that the running cogs were within twelve to fifteen inches of his face and in plain view. The following questions being propounded to the witness and the following answers were given by him:

"Q. When you stood on the platform in front of those cog wheels, your face was as close to the cog wheels as my face is to you now, about a foot and a half or two feet? Is not that a fact?

A. Just about one foot.

Q. Now, standing in front of those cog wheels, you were attempting, you said, to oil the cogs; is that right?

A. He puts it in the box. He did not put it in the wheels.

Q. Your counsel asked you if you were oiling the cog-wheels and you said yes, but you were oiling the boxing—you were not oiling the cog wheels, but you were oiling the boxing that carried the shaft upon which the cogs operated, is that the fact?

A. Well, he oiled both of them—the cogs and the boxes.

Q. When you stood on this platform these cog wheels in which you got your arm caught were right in front of your face?

A. Yes.

Q. Now, you were going to put oil in this bearing and also oil the bearing back there that carried the big wheel, were you not?

A. Yes sir, on all sides.

Q. All four of them?

A. On all four of them.

Q. (p. 34) Which one were you oiling when the cog caught your sleeve, which bearing were you oiling—which one were you putting oil on when your sleeve got caught?

A. On the other shaft—the one behind there. On the right hand side.

Q. (35) You just held your can up over the cog wheels and let the oil drop down where one wheel ran into the other, did you?

A. Yes sir.

Q. (p. 36) Now after you oiled those bearings at the right hand side of the machine as you faced it, then you reached your right arm across to oil the bearing that was farthest away from you on the left, and in doing so you got your sleeve over into those cogs, that's right, isn't it?

A. Yes.

Q. (p. 38) But when you oiled those cogs, that is what you did every time—you kept the spout off the cogs, didn't you?

A. Yes.

Q. Why did you keep the spout off those cog wheels when you were oiling the cogs; why didn't you put it down into the cogs?

A. He takes the hard grease, he says, it is hard, and he throws it into the box—sometimes a little will drop on the wheels, and let it drop down.

Q. Why didn't you take the hard grease with your hands when the machinery is running and put it into the cog wheels —why didn't you do that—why did you let it drop over—you knew better than that, didn't you?

A. What would he take his hand and put it on there when he knew better?

Q. You knew if you put your hand into those cog wheels for any purpose at all when the machinery was running it would cut your hand off, didn't you?

A. He says he is not crazy enough to do anything like that."

10. The Court erred in so much of its general charge to the

jury as left it to determine whether or not the defendant had furnished the plaintiff a safe place in which to work, and instructing the jury that the failure to exercise due care to make the place and surroundings reasonably safe for employes is a neglect of duty which is a legal wrong, and when an injury is suffered in consequence of that kind of a wrong, the employer is liable on the principle of rendering compensation for an injury suffered in consequence of his wrongful conduct.

11. The Court erred for the reason that upon the undisputed testimony of the plaintiff himself he knew that the cogs existed at the place where they were; he knew they were in operation; he knew that if his hand came in contact with them, or the sleeve of his coat, that he would be injured, and he performed the work of oiling these bearings and cogs without any complaint and voluntarily assumed the risk of the injury he received, and waived the application of the doctrine of "Safe Place" to the situation which existed at the time of his injury.

12. The Court erred in its charge to the jury in instructing the jury that it should only require the plaintiff to exercise such faculties and capacity as he is endowed with by nature for the avoidance of danger, and in not instructing the jury, as a matter of law, that the danger was open and visible, as well as known to the plaintiff, and that if such danger was known to a man of ordinary care and prudence in the conduct of such business, the plaintiff himself would be charged of the notice as a matter of law.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing motion, knows the contents thereof, and believes the same to be meritorious and well founded in law.

J. A. KERR.

Subscribed and sworn to before me this 10th day of October, 1911.

(Seal) J. N. IVEY,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of within Motion received and due service of same acknowledged this 11th day of October, 190...

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Motion to Set Aside Judgment. Filed U. S. Circuit Court, Western District of Washington, Oct. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Complainant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

On application of Kerr & McCord, attorneys for the defendant above named, and for good cause shown, the motion for judgment notwithstanding the verdict and in the alternative for new trial not having yet been passed upon by the trial Court;

It is ordered that the time within which the defendant may file its bill of exceptions in the above entitled cause to matters occurring at the trial and duly excepted to, be extended by the Court from October 20, 1911, to which date the same was ex-

tended by order heretofore made and entered by this Court, to the 15th day of November, 1911, in which to file and serve its bill of exceptions.

Done in open court this 16th day of October, 1911.

C. H. HANFORD, Judge.

O. K. Herbert W. Meyers, Atty. for Complainant.

Indorsed: Order to Extend Time to File Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Oct. 16, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*

No. 1934.

PLAINTIFF'S BRIEF

ON MOTION *NON OBSTANTE* AND NEW TRIAL.

In its motion for judgment *non obstante veredicto* and in the alternative for a new trial, the defendant has based his right to such action by the Court upon the grounds of the assumption of the risk by, and the contributory negligence of, the plaintiff, alleging that because thereof, the verdict is contrary to and not sustained by the testimony and the evidence, and is contrary to law; and asserts that the Court erred in refusing to grant a nonsuit, when the motion for nonsuit was made immediately after the close of the plaintiff's evidence, in view of the plaintiff's assumption of the risk and his contribu-

tory negligence; also, that the Court erred in its instructions to the jury and in its failure to instruct the jury according to the request of the defendant.

It is asserted that the "undisputed testimony" of the plaintiff showed that the plaintiff assumed the risk of injury in the manner in which the injury occurred, and, also, was negligent; and it is presumed that the testimony set out in its motion to set aside the judgment is referred to, since it is but reasonable to suppose that it would cite in its motion the strongest "undisputed testimony" which the transcript would disclose.

Assuming such to be the fact, the question arises at once, is that testimony undisputed, and, if it be undisputed, does it indicate that the plaintiff knew of, understood and appreciated the dangers to which he was exposed by reason of the defendant's negligence.

The climax of this testimony is reached in the last question and answer quoted, viz:

Q. "You knew if you *put your hand into those cog wheels* for any purpose at all when the machinery was running, it would cut your hand off, didn't you?"

A. "He says that he is not crazy enough to do anything like that."

The Court will readily distinguish the difference between putting one's hands in among cog wheels, and reaching over such cogs to put oil on a bearing of the machine of which the cogs were a part. Plaintiff was oiling the bearings and not thrusting his hands into the cogs, as defendant would have us believe.

The knowledge of a possible injury one may suffer if he deliberately places his hand in exposed cogs or wheels, as distinguished from his knowledge of the danger to him from a situation in which he is placed by reason of the negligence of another in not furnishing safe surroundings and suitable instrumentalities in and with which to work, is distinguished in a case in the Circuit Court of Appeals, Second Circuit, decided January 9, 1911, in which case the parties and the facts were practically no different from those in the present case. In

that case, the defendant alleged that the plaintiff, who was a Russian Pole, speaking and understanding the English language imperfectly, a common laborer, while working for the defendant had his right arm caught in a machine and so crushed and mangled that amputation became necessary, was negligent in that he endeavored to put certain material into a machine while it was in motion; the injury occurring four and one-half days after he had first commenced to work with the machine. The defendant's theory there was, as is contended in this present case, that the plaintiff instinctively knew of the danger. In the opinion in the case, *American Manufacturing Company v. Zulkowski,* C. C. A. 146, the Court, through Coxe, Circuit Judge, said:

"In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. *Even the most ignorant laborer would have known that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. * * * The jury were justified in considering the improbability that he would do an act which would impeach his sanity.*"

Thus, it is held that while a person's instinct may create within him a certain fear due to his surroundings yet not induce such knowledge as would bring him to *understand and appreciate* the danger, so as to charge him with negligence in having encountered it.

The recognition of this distinction between instinctive fear and actual knowledge and appreciation of danger, as applied in cases of this character, is well stated by this Court in the case of *Nottage v. Sawmill Phoenix*, 133 Fed. 979, wherein Your Honor said:

"The law does not place upon employes an obligation to investigate conditions and assume the risk of accidents which happen from dangers which might be revealed by a reasonably thorough inspection of places and appliances, but merely takes for granted that by voluntarily entering into employment or continuing therein, they do thereby assent to the exposure of

themselves to *all such as are necessarily obvious to them in view of their capacity, knowledge and experience, each case being judged by its peculiar facts.*"

These cases just cited go to establish the rule that where a servant either does not know, or, knowing, *does not appreciate such risks;* and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries; and the natural corollary that if the employer knows, or ought to know, that the dangers for the employment are unknown to or not appreciated by the servant, the servant should be instructed so that he may reasonably understand the perils. That such is the rule of law is well supported by decisions of the highest courts.

Choctaw, etc., R. Co. vs. McDade, 191 U. S. 64. (48 L. Ed. 96.)
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Voelker v. Railroad Co., 116 Fed. 867.
Railroad Co. v. Holloway, 52 C. C. A. 260 (114 Fed. 458).
Pierce v. Calvin, 27 C. C. A. 227 (82 Fed. 550).
Davison v. Railroad Co., 44 Fed. 475.
Bean v. Navigation Co., 24 Fed. 124.
Thompson v. Railroad Co., 18 Fed. 239.
Railroad Co. v. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464).
Lathi v. Rothschild, 60 Wn. 438.

The mere fact that the employe knows there is danger will not defeat his right to recover if in obeying the order of his employer he acted with ordinary care under the circumstances.

Allen v. Gilman, McNeil & Co., 127 Fed. 609.
R. R. v. Linstedt, 106 C. C. A. 238.

In the case of the *Atlantic Coast Line Railroad Co. v. Linstedt*, 106 C. C. A. 238, decided late in the year 1910, it is said:

"The defendant cannot, as a matter of law, defeat the right of the plaintiff to recover merely because the danger of riding on a brake beam was apparent, if the safety and suitableness of the same as an appliance was in issue, and the inexperience,

lack of knowledge and failure of warning to the plaintiff was also present.

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*

Authorities to support these views might be given almost without number. *Butler v. Frazee*, 211 U. S. 459, 466, 469, 29 Sup. Ct. 136, 53 L. Ed. 281, an opinion by Mr. Justice Moody, will be found to contain a particularly interesting discussion of the subject, with citation of authorities."

In the case of *Butler v. Frazee*, 211 U. S. 459, 53 L. Ed. 281, is said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to *understand, appreciate and assume* the risk of it."

Railroad Co. v. Swearingen, 196 U. S. 51 (49 L. Ed. 382).
Fitzgerald v. Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537.
R. R. v. Jarvi, 53 Fed. 651 (3 C. C. A. 433).

In *Railroad v. Swearingen*, 196 U. S. 51 (49 L Ed. 382), the following language was employed:

"As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 *could not be imputed to the plaintiff simply because he was aware of the existence and general location* of the scale box, *it was for the jury* to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual *knowledge of* the danger."

Indeed, it has been said that a servant who does not *appreciate* the dangers to which he is subjected is not to be held to have assumed the risks of the employment only, but that he *cannot consent* to assume them. In *Felton v. Girardy*, 104 Fed. 127, the opinion by Lurton, Circuit Judge, says:

"If the employment be of a dangerous character requiring

skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, *incapacity or inexperience, does not appreciate them, the servant cannot, even with his own consent, be exposed to* such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and with proper care on his part, do his work safely."

The same Court, by the voice of the same Judge, said in *Railroad Company v. Miller*, 104 Fed. 124:

"It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant; unless the dangers are so obvious that even an *inexperienced man could not fail to escape them by* the exercise of ordinary care.

The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from want of the degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity.

If the master has notice of the dangers liable to be encountered, *and notice that the servant is inexperienced*, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty."

In the case of *Clow & Sons v. Holtz*, 34 C. C. A. 550, the Court left the question to the jury to say whether the car by which the plaintiff was injured, as constructed, with certain wedges which had been added and of which he knew, was a machine which a reasonably prudent employer would furnish to his servants to be used in his business, and charged the jury that if the dangerous character of the machine was so obvious that an ordinarily intelligent laborer of the class of laborers to which the plaintiff belonged must or should have

observed its danger, and the plaintiff nevertheless continued in the employ of the master without complaint, he assumed the risk incident to such employment, and was guilty of contributory negligence, should injury occur.

The Circuit Court of Appeals, in an opinion by Taft, Circuit Judge, said:

"The only point upon which we feel the slightest doubt in this case arises upon the motion which was made by the defendant, at the close of the plaintiff's evidence, to take the case away from the jury and direct a verdict for the defendant, on the ground that the plaintiff *must have known* the dangers incident to the use of the machine from the use of which the injury happened, *and must therefore have assumed the risk.*

Now that the accident has happened, now that the measurements are given, now that the weight of the cores are accurately known * * * it may be difficult to understand how anyone with the slightest knowledge of mechanics could fail to appreciate the dangers arising from the use of this car with the cores adjusted as they were. But it must be borne in mind that the plaintiff was a *common laborer;* that the safety of the machine had been brought to the attention of the superintendent and managers of the foundry; that the car had been operated for six months without injury, and that the plaintiff had a right to assume that his master would exercise due care in his behalf in keeping the machinery and appliance safe.

In the light of these considerations, *we cannot say that the question of the plaintiff's negligence, or the question of the amount of risk which he assumed, was not a* question for the jury.

It was left to them with the proper and discriminating statements of the law, and application of the law to the facts.

The jury found that the circumstances were such that he was not charged with the knowledge of the danger incident to the use of that machine.

We do not think the course of the Court, in leaving this issue open to be settled by the jury, was erroneous."

In *Deninger v. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911, Gray, Circuit Judge, said:

"The defendant, however, relies strongly upon the proposition that the risks of the situation were all known to and appreciated by the deceased, and therefore assumed by him as risks of his employment. Certainly this is true of the ordinary risks inherent in the employment, but it is not true of the risks or danger arising from the default of the defendant.

Whatever the risks assumed by a servant in entering upon his employment may be, the one risk he does not assume, is that arising from the negligence of his employer. * * *

The law deals with men in their various relations in life, as endowed with average intelligence and capacity, and recognizes their limitations, and that under certain circumstances, inadvertence and distraction may be excusable, where under other circumstances they would constitute a serious default. *If, then, the absence of the automatic safety device, which in efficient operation would have prevented the accident, was due to a want of reasonable care on the part of the master, the risk arising from its absence was not one of the risks assumed by the deceased in entering upon his employment.* Though this risk, arising from the negligence of the master, was not thus assumed, yet it is true that, if the deceased was *aware of and appreciated the danger* therefrom he might, by his own negligence in exposing himself thereto, have contributed to his injury, and thus debarred himself from recovery. But there is no affirmative proof of such negligence on the part of the plaintiff, and no fact referred to from which such negligence can be properly inferred as a matter of law. The facts and testimony bearing upon the question were, however, submitted to the jury with proper instructions by the Court below.

In considering, on the evidence, the question as to how far primary duty of the master was performed, in providing the safe place in which to work and the safe appliances with which to work, it must be remembered that there was no compulsion on the defendant to use this dangerous hand lever in the operation of its machine. There was testimony before the jury, to be given such weight as they determined justly attached to it, that these levers were first used in these new and large machines; that this very head had been frequently operated with

a wheel of moderate size, and that it had been so operated ever since the accident. Obviously, the use of the wheel for the purpoes that the lever was used for, would have avoided all the dangers attending upon the latter. The mere fact that it required more power to move a wheel of moderate diameter, would not necessarily excuse the defendant from adopting it, in view of the tragic experience in its own shops with the hand lever. No mere economy, pecuniary or otherwise, can excuse a master from the performance of the primary duty imposed upon him to make a reasonably safe place in which his servant is to work.

This case was submitted to the jury by the learned judge of the Court below, and with this evidence all before it, it found a verdict in favor of the plaintiff. A motion for premptory instructions for the defendant was denied by the Court, and after verdict, motion for a new trial and for judgment, *non obstante veredicto,* was made by the defendant, which latter motion was granted by the Court, and a judgment entered accordingly. *We think this case should not have been disposed of, and there was evidence sufficient to go to the jury and to warrant the verdict rendered."*

It may be contended by the defendant that the rule of the law in the State of Washington differs from the rule as laid down in the cases cited. The opinion in the case of *Lahti v. Rothchild,* 60 Washington, 438, rendered in November, 1910, says:

"Learned counsel for appellant contend that the use of the large link chain for handling this lumber, and the evidence tending to show that it was not suitable for that purpose, was a sufficient showing of negligence on the part of respondents to call for the submission of that question to the jury. This contention we think is well founded, unless it can be held, as a matter of law, that appellant assumed the risk incident to the use of the chain because of his knowledge of such use and the danger thereof. It seems to us that a jury might well be justified in believing from this evidence that the risk incident to the use of this large link chain was extraordinary. That is, *that it was a risk which could have been obviated* by the

exercise of reasonable care on the part of respondents. 1 Labbatt, Master and Servant, S 270. Hence, its use might justify a finding of negligence against respondents, though it may be conceded that it would not be such negligence but that liability therefor could be obviated by appellant's assuming the risk. Now, can it be said, as a matter of law, upon this record, that appellant assumed this risk, supposing that the jury might conclude that the risk was extraordinary. This question must be answered in the light of the evidence touching appellant's knowledge of the use of the chain, *and also his knowledge of the danger incident to its use.* Of course, he knew of the use of the chain, but before he can be charged with assumption of the risk, it must appear that he *comprehended the danger* as well as knew of the physical conditions. Bailey, Master's Liability for Injuries to Servants, 184; Wood, Law of Master and Servant (2d Ed.), S. 376; *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.,* 27 Wash. 637, 68 Pac. 380.

In 1 Labatt on Master and Servant, S 271, the rule is stated as follows:

"An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and *comprehended* by the servant, or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and *comprehension of the risk.*"

Learned counsel for respondents contend, in substance, that the evidence of appellant's experience as a longshoreman is sufficient to impute to him a *comprehension of the dangers* of using this large link chain, and that the trial court was justified in so determining as a matter of law. It is true that appellant appears to be a longshoreman of considerable experience. He tells us in his testimony, however, that he never had experience in the use of a chain of this size in handling pieces of these dimensions, and did not know that such chain could not securely hold a sling load of such pieces. We have seen that he worked there five or six days under these conditions without anything occurring that would suggest such danger to him. *If he comprehended,* or was bound to compre-

hend, such danger, it was only because of his general knowledge of, and experience in, the business. It seems to us the danger was not so apparent that it can be decided, as a matter of law, that a reasonable person in his position and *with his knowledge and experience* was bound to *know and comprehend* the risk incident to the use of this chain. *We think reasonable minds might differ upon this question, and that it was therefore a question for the jury.* We conclude that the learned trial court erred in taking the case from the jury at the close of appellant's evidence."

What are the "peculiar facts" in this case at bar with respect to the capacity, knowledge and experience of the plaintiff, as shown by the evidence in the case, and upon which should be based the decision as to whether or not the danger incurred by him in working about the cogs which caused his injury was necessarily obvious to him, in view of the opinion of this Court in the case of *Nottage v. Sawmill*, referred to heretofore?

The plaintiff was an *uneducated* man, who does not *speak nor understand* the English language. He testified that he was employed in the capacity of a common laborer, that he had no knowledge of machinery, had never worked about it, never saw a set of cogwheels prior to beginning work for the defendant company, and was not instructed as to the manner of doing the work nor of the danger which he would encounter in doing it. Upon cross-examination he re-asserted that he had never worked with machinery other than the pick and shovel, nor about it, nor in mines, and was totally ignorant of it. *His testimony is absolutely undisputed.* It is evident, therefore, that, as a matter of law, he was disqualified to do the work assigned to him in the oiling of the cogs which caused his injury, because of his want of capacity, lack of knowledge and inexperience, and consequent failure to *appreciate and actually know the danger incident to such work.*

Transcript, pp. 27, 28, 29.

The Circuit Court of Appeals, Ninth Circuit, in an opinion by Gilbert, Circuit Judge, in *Puget Sound El. Ry. v. Van Pelt*, 93 C. C. A. 492, said:

"To make a complete and valid defense on that ground, it

should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was; the nature of the danger in which he was placed for work, with that fuse located as it was. The law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. * * * He is chargeable with the assumption of risks that are necessarily incident to the employment, and with the assumption of risks which he knew about, *of which he had knowledge—actual knowledge*—and also the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake."

Could it be possible to conceive of a more thoroughly irresponsible person in the situation in which this plaintiff was placed when he was ordered to oil the cogs, gears, etc., which caused his injury, or one having less experience or capacity and less capable of *understanding and appreciating* the dangers incident to the work to be done; or one more completely within the exceptions announced in the cases which have been cited above? Can it be said, either as a matter of law or as a matter of fact, that the plaintiff in this case, upon the evidence in the case, *appreciated* the danger he encountered? If he did not, then, as a matter of law, he did not assume the risk.

The defendant insists that the Court should have granted the motion for nonsuit when made by it at the close of the testimony in behalf of the plaintiff, upon the ground that there was evidence that the plaintiff contributed to the happening of the accident by his own negligence, as shown by the testimony, for which reason he could not recover.

In ruling upon this motion for nonsuit, your Honor said, in part:

"For the purposes of this trial, the Factory Act is eliminated from the case, and the question of negligence is to be found by the jury to entitle the plaintiff to recover any dam-

ages. I think there is enough evidence in the case to require you to make your defense, or at least require the Court to submit the case to the jury under the rulings of the Circuit Court of Appeals for the Ninth Circuit, which has the controlling voice in a case litigated in this Court."

Transcript, p. 77.

Your statement that "the question of negligence is to be found by the jury to entitle the plaintiff to recover damages" is a statement universally supported by the Courts. As was stated by the Supreme Court of the United States in the case of *Davidson Steamship Company v. United States,* 205 U. S. 187 (51 L. Ed. 766):

"Now, whether the injury was the result of negligence, and which party was guilty of negligence, are questions of fact properly determinable by the jury. * * * The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence per se, the determination of the question is peculiarly the province of the jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous.

Courts do not approach the question as an original one, and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact.

Authorities in this Court, as well as in others, are abundant and clear on this point."

Railroad Co. v. Fraloff, 100 U. S. 24 (25 L. Ed. 531).
Kane v. Railroad, 128 U. S. 91 (32 L. Ed. 339).
Jones v. Railroad, 128 U. S. 443 (32 L. Ed. 478).
Dunlap v. Railroad, 130 U. S. 649 (32 L. Ed. 1058).
Railroad Co. v. McDade, 135 U. S. 554 (34 L. Ed. 235).
Railroad v. Converse, 139 U. S. 469 (35 L. Ed. 213).
Railroad Co. v. Powers, 149 U. S. 43 (37 L. Ed. 642).
Hackfeld & Co. v. United States, 197 U. S. 442 (49 L. Ed. 826).
Hall v. Northwest Lumber Co., 61 Wash. 355.

Easterly v. Lumber Co., 60 Wash. 647.
Lahti v. Rothchild, 60 Wash. 438.

In the case of *Lahti v. Rothchilds*, 60 Washington, 442, it is said:

"We think reasonable minds might differ upon this question, and that it is therefore a question for the jury."

In *Atlantic Coast Line R. R. Co. v. Lindstedt*, 106 C. C. 238, the Court says:

"In a case, as here, however, where the plaintiff bases his right of recovery on the unsafe and defective appliances of the defendant, and sets up his own infancy, and the defendant relies as a defense upon the plaintiff's assumption of risk and contributory negligence, and the plaintiff's inexperience, and the defendants failure to instruct him in his duties, or, properly warn him against unusual danger or hazard incident thereto appearing, then, in such case, it at once becomes material to determine whose negligence really brought about the disaster, that of the plaintiff in not properly performing the duties required of him, or the defendant in failing to perform some duty imposed upon it, which can only be ascertained from a full consideration of all of the facts and circumstances surrounding the occurrence; *and the jury is the proper tribunal to settle disputed issues of fact thus arising, if any there be, as in any other case.*

Just when, and when not, issues of fact in cases of this character should be withdrawn from the jury, seems now too well settled in the Federal practice to admit of serious controversy. 'The question of negligence is one of law for the Court only where the facts are such that *all reasonable men* must draw the same conclusion from them, or, in other words, a case should not be drawn from the jury unless the conclusions follow as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish. *Gardner v. Mich. Cent. R. R. Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 144, 37 L. Ed 1107, supra; *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 258, 29 Sup. Ct. 619, 53 L. Ed. 984. In this case disputed questions of fact having arisen as to the *suitableness and safety of the ap-*

pliances furnished by the defendant to the plaintiff, with which to perform the service required of him, and the necessity for the use thereof by plaintiff when injured, as well as over the plaintiff's capacity properly to perform the service in hand, in the light of his youth, knowledge and experience, and whether, because thereof, and from lack of instruction and proper warning, he either did not know of the danger in which he was placed, or, if apprehended, it was *not appreciated* by him, and as to all of which there was a considerable conflict in the testimony, it was *manifestly proper for the trial court to overrule the motion for nonsuit, and to instruct a verdict for the defendant*, and to submit the same to the jury under proper instructions as to the law applicable to the case, which was done, with such degree of fairness to the defendant, that no objection thereto was made by it, though the plaintiff excepted to the rejection of sundry requests for charge to the jury asked by him. Under these circumstances, a verdict having been returned for the plaintiff, which has met with the approval of the trial judge who saw and heard the witnesses testify, and was therefore peculiarly able to judge of the weight that should have been given by the jury to their several statements, this Court would not be justified in disturbing the judgment thus entered, particularly on a motion to either withdraw the case from the jury, when the view of the testimony most favorable to the plaintiff must be taken." *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984, supra.

The C. C. A. 9th Ct. in *Railroad v. Lundberg*, 100 C. C. A. 323, holds that:

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. The question of assumption of risk also involved consideration of the facts and circumstances adduced upon the trial, and was properly submitted to the jury."

See, also, *N. P. R. Co. v. Charles*, 51 Fed. 562.

With respect to the merits of the defendant's contention

when viewed in the light of the facts, it will be remembered that in this case the plaintiff alleged that the injury done to him was due, among other things, to the negligence of the defendant in not furnishing a safe place and suitable instrumentalities in and with which to work, having "failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected (p. IV), and, also "that the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearing." (P. VI.)

That it was the duty of the employer to provide a safe place and suitable instrumentalities in and with which his employees were required to work cannot be questioned in view of the decision in the case of *Kreigh v. Westinghouse*, etc., 214 U. S. 249 (53 L. Ed. 984), wherein the Supreme Court said:

"The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this Court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared."

Railroad Co. v. Mackey, 157 U. S. 72 (39 L. Ed. 629).
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Railroad Co. v. McDade, 191 U. S. 64 (48 L. Ed. 96).

The case of *Railroad Co. v. McDade*, 191 U. S. 64, is one in which the Supreme Court goes into detail with regard to the duty of the master, and says:

"Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employe should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer.

"We agree with the Circuit Court of Appeals in affirming the instructions upon this subject given by Judge Hammond to the jury, in which he said: 'It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience,

so free from any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, *that not to make such a construction safe for brakeman on trains is a conviction of negligence.*' "

In *Mather v. Rillston*, 156 U. S. 391 (39 L. Ed. 464), it is said:

"Occupations, however unimportant, which cannot be conducted without necessary danger to life, body or limb, should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual dangers there must be used all appliances readily attainable known to science for the prevention of accidents, *and the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence.*"

In *Cox v. Coal Co.*, 61 Wash. 347, it is said:

"It was the duty of the master to see that the mine was properly timbered, and if you find from the evidence that there were safe and unsafe ways of timbering the mine known to the defendant, then it became the duty of the defendant to adopt the safe way." And if the safe way was not adopted, the defendant was negligent.

In *Housen v. Seattle Lumber Co.*, 41 Wash. 354, it is said:

"It is the duty of the defendant to use all reasonable care and forethought to provide appliances necessary to the safety of the plaintiff and such appliances as would avoid injury to its employes, so far as it could possibly be done."

These cases to establish the rule that the employer must provide suitable surroundings for his employes, they do not define what may be deemed safe places and suitable instrumentalities. What may be deemed to be the performance of his duty by an employer in so far as providing a safe place in which to work is well stated in *Deninger v. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911. In the opinion Gray, Circuit Judge, said:

"Must not an employer, to reasonably live up to his pri-

mary duty in this respect, consider a situation which might be called extraordinary, and protect where he can protect, by using the care required by such situation, an operator from dangers to which he may be exposed by reason of inadvertence or distractions which may happen to men of average intelligence and prudence?

Can it be said that, in view of the foregoing facts, the defendant had used all the care that was incumbent upon it to use, in order to render the place in which the deceased was required to work, reasonably safe? To use that degree of care was the primary duty imposed by law upon the defendant—a duty not to be avoided, and the responsibility of which could not be delegated. We think there was evidence, sufficient at least to go to the jury, as to whether the defendant had not fallen short of the degree of care required of it in the premises, by removing the automatic safety device operating, as described, in the handle and collar of the lever. The evidence shows, and it is admitted by the defendant, that the deceased came to his death by having his skull crushed by the revolution of this hand lever. The pinion was then in engagement with the feed wheel, and the power must have been communicated from it to the pinion and sleeve to make the latter revolve. But this accidental revolution of the sleeve would not have caused the hand lever to revolve, unless the pawl thereon had been engaged with the ratchet on the sleeve. It was equally clear that this could not have been the case, if the automatic safety device had been attached to the hand lever and in working order.

It is true, that by constant and unremitting attention to those precautions which it is to be assumed *he knew* were necessary, the danger might have been avoided; *but can a place and situation in which a servant is required to work be said to be reasonably safe, where possibly excusable distraction of the operator's attention may cause the omission of some precaution necessary to his safety, and where the penalty of such omission is instant death or serious bodily harm?* In the present case, it seems to be established by the evidence that the deceased apprentice was fairly well acquainted with the operation of this large and dangerous machine, and that he was in-

had been put to work upon a dangerous machine without proper instructions to enable him to conduct himself safely in operating it, then the defendant is guilty of negligence."

Denninger v. American Loco. Co., 107 C. C. A. 127, says:

"Whether the servant in a given case has contributed, by his own negligence, to the negligence of the master, in causing the injury complained of, is another question, to be determined against him only by evidence sufficient to rebut the presumption of due care on the servant's part. *It will be a question for the jury to say whether the deceased is to be considered in fault and to have contributed to the accident causing his death*, because, *while standing in front of this powerful machine, compelled to operate the levers controlling* the power on the one hand, and on the other, to watch with unremitting attention the combination of the hand lever with the sleeve and pinion, and to take the detailed precaution necessary to avoid the danger we have spoken of, he may have omitted, in a moment of inadvertence or distraction, some one of the precautions necessary for his safety."

At the close of plaintiff's testimony, there was sufficient evidence to warrant the Court in holding that the defendant was negligent, to the extent of leaving no doubt in the minds of reasonable men as to his culpability in that respect, since the Court, itself, stated that there was sufficient in evidence to require the defendant to make his defense, which view was, after the defendant had put its case in, supported by the verdict of the jury.

Page 77, Transcript.

The Court did not err in denying defendant's motion for nonsuit, at the close of plaintiff's case, since there was testimony which, if not contradicted, would sustain the main allegations of the complaint, and that it was not overcome by the testimony of witnesses for the defendant is established by the verdict of the jury.

In *Kreigh v. Westinghouse, etc.*, 249 (53, 984), it is said:

"Questions of negligence do not become questions of law to be decided by the Court, except where the facts are such that all reasonable men *must* draw the same conclusion from them;

or, in other words, a case should *not* be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon *any view which can be properly taken of the facts the evidence tends to establish.*"

Gardner v. R. R. 150 U. S. 349 (37-1107).

Twelve men of the average of the community comprising men of education, men of learning, and men whose learning consists only of what they have themselves seen, heard and experienced—merchants, mechanics, ranchers, bankers, clerks, laborers, an employer of labor who had himself defended a personal injury suit, sat together, listened attentively to the proof submitted by both sides to the controversy, consulted with another, and applied their separate learning and experiences of the affairs of life to the facts as proven, and drew a unanimous conclusion, and it is this average judgment of such men, under proper instruction as to the law by the Court, in a contested case that the law strives to obtain.

Objection is made to the testimony of witness Savage, wherein he stated that he had placed guards upon the cog wheels of the motor that the plaintiff was told to operate; and, also, that the guards could have been put upon the cog wheels which injured the plaintiff.

If the evidence was material it was admissible. If it was immaterial, or irrelevant, error in admitting it would depend upon whether or not it was prejudicial to the defendant.

Cox v. Coal Co., 61 Wash. 348.

It was introduced for the purpose of establishing the fact of the ignorance, incapacity and inexperience of the plaintiff and the fact of the negligence of the defendant, as set forth in the complaint, and as such, was material and relevant.

In *Hansen v. Lumber Co.*, 41 Wash. 353, it is held, with respect to the admission of such evidence:

"This evidence was introduced and admitted for the avowed purpose of showing the defective and dangerous condition of the cog wheels, and that appellant knew thereof. We think it was admissible for that purpose."

Merst v. Coal Creek R. R. Co., 42 Wash. 179, holds that such

evidence is admissible when pertinent and directed to the proof of the allegations of the complaint.

In *Shaw v. Shingle Co.*, 61 Wash. 58, will be found a full statement relating to the admission of evidence of the character to which objection is made in this case, in that case:

"A witness was asked whether he had seen a guard, a model of which was exhibited, or similar guards in use in shingle mills. After objection and some colloquy, the Court ruled that the witness could "testify as to whether or not it is practicable to put a guard upon a saw of that kind."

No exception was taken to this ruling, and the witness answered, "It is," and it was held not error to admit it.

This case also holds that the admission of proof of a custom to guard exposed machinery was not error.

"We think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with other facts and circumstances developed by evidence in the case." * * *

That the rule may not be abused it has been held that the ordinary discretion vested in a trial judge is to be exercised in allowing or rejecting this character of testimony.

In determining what machinery can and what cannot be effectively guarded in this matter, you may take consideration what is the custom of other prudent persons operating similar machinery with respect to guarding the same. * * *

It may aid the jury in determining the practicability of this guard or not. This is an issue in this case.

On the question whether the employer has exercised reasonable and ordinary care in providing and maintaining safe appliances, and places for work, the plaintiff may show the general practice of other employers in similar lines of employment in these respects:

Olesen v. N. O. Lumber Co., 119 Fed. 77.
Spiro v. Fellon, 73 Fed. 91.
Crocker v. Co., 34 Wash. 191.

Now, if evidence to show custom of others in guarding machinery is admissible, is not evidence of the fact that the defendant itself had put guards upon similar machinery which it set the plaintiff to work about equally admissible?

The danger of an operator getting his hands caught in a dangerous machine, and what precautions to take to prevent it is deemed to be a subject for expert testimony.

Thompson, Negligence, Sec. 7752.
N. Y. Biscuit Co. v. Roass, 74 Fed. 608.
Peterson v. Johnson, 70 Minn. 538 (73 N. W. 510).

In *Peterson v. Johnson*, 70 Minn. 538, a case similar to the case at bar, it was said:

"Assignments of error 11 to 14, inclusive, challenge the correctness of the rulings of the Court in permitting plaintiff's witness to testify as to whether a guard could have been placed around the gearing in question, and whether it was practicable to place one there. We are of the opinion that the evidence was competent expert evidence, and whether the witness was qualified as an expert to testify as to these matters was, on the evidence, a question of fact for the trial judge."

The Court was fully warranted in not giving the jury the instructions requested by the defendant, since they not only did not state the law of the case, but, as well, did not correctly state the testimony of the plaintiff upon which defendant bases its instructions.

The language of the requested instructions would lead to the belief that the plaintiff had testified to the fact of knowledge of the danger he encountered, whereas the fact is that he testified that *he did not know of it.* He testified that he never saw cog wheels before, and did not know whether he would get hurt if he put his hands in them.

Transcript, page 27.

With respect to instruction No. 1, it is apparent that the defendant did not know that the plaintiff was experienced. It is not shown that inquiry had been made to determine the fact. It must be presumed that if inquiry had been made, proper instructions as to safeguarding himself would have been given the plaintiff. It is in evidence that the defendant believed the

plaintiff was not experienced, since, as testified by witness Savage, its foreman, steps were taken to prevent injury to the plaintiff by guarding the machinery with which he was to work within the scope of his regular employment.

Since it is not in evidence that the defendant knew the plaintiff to be experienced, it necessarily follows that the duty of the defendant was to warn and instruct him properly, and failing so to do, was negligent. There is nothing in law which excuses the negligence of a master in this regard.

In *Anderson v. Columbia Imp. Co.,* 41 Wash. 84, it is said:

"A master is *prima facie* bound to instruct a servant as to all risks which are abnormal and extraordinary and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself. There can be no doubt but that this rule is correct."

It is the rule of the law that where there are patent defects or hazards incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, if through youth, inexperience, or other cause, the servant is incompetent to fully *understand and appreciate* the nature and extent of the hazard.

Railroad v. Fort, 84 Ill. 17, Wall 553 (21 L. Ed. 739).
Choctaw, etc., R. Co. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Voelker v. Railroad Co., 116 Fed. 867.
Railroad Co. v. Holloway, 52 C. C. S. 260 (114 Fed. 458).
Pierce v. Clavin, 27 C. C. A. 227 (82 Fed. 550).
Davison v. Railroad Co., 44 Fed. 476.
Bean v. Navigation Co., 24 Fed. 124.
Thompson v. Railroad Co., 18 Fed. 239.
Railroad Co. v. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464.)
Lahti v. Rothchild, 60 Wash. 438.
Dealon v. Abram, 60 Wash. 6.

Defendants instruction No. 1 was, therefore, properly refused.

With respect to the defendant's requested instructions Nos. 2, 6 and 7, "A person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defect or unguarded part, and if injured thereby, cannot recover"; attention is invited to the case of *Doyle v. G. N. Ry. Co.*, 43 Wash. 563, wherein it is held:

"The true rule, as nearly as it can be stated, is that a servant can recover for an injury from defects due to the master's fault, *of which he had notice,* if under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar circumstances, have continued the same work under the same risk." Concerning the contention that no notice to the proper agents of the company was shown when there was opportunity therefor; it is sufficient to say that the engineers and conductor on the train had notice of the defects, and that it was not necessary for the fireman who was under their control to report to any other agent of the company.

And also, *Allen v. Gillman McNeil & Co.*, 127 Fed. 609, to the effect that:

"The true rule in this, as in all other cases, is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon the master's opinion." * * * If, therefore, he continued to incur the risks of such defects, under any kind of necessity or coercion, such as the threat or reasonable fear of his dismissal, he does not voluntarily assume the risk, and is not necessarily debarred from recovery thereby."

While the instructions might not be objectionable as a statement of the law in a case where there was *no dispute as to the knowledge of the danger from the defects or unguarded parts* on the part of the plaintiff, it probably would confuse, if not positively mislead, the jury in a case where, as in this, the *knowledge and appreciation* of the plaintiff of the danger is in dispute, and a proper question for the determination of the jury. This Court properly declined to employ the language of the defendant.

Instruction No. 3 was properly refused, for the reason that it did not limit the apparent peril to such perils and hazards as was *understood and appreciated* by the plaintiff.

Atlantic, etc., R. R. v. Lindstedt, 106 C. C. A. 238.
R. R. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
R. R. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
R. R. v. Jarr, 53 Fed. 65.
R. R. v. VanPelt, 93 C. C. A. 492.
Lahti v. Rothchilds, 60 Wash. 438.
Deninger v. Co., 107 C. C. A., 127.
Butler v. Frazee, 211 U. S. 459 (53 L. Ed. 281).
Allen v. Gillman, etc., 127 Fed. 615.

In the case of *R. R. v. Lindstedt,* 106 C. C. A. 238, it is said:

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*"

As to the duty of employe to disobey an order to work in a dangerous place, the case of *Talkington v. Veneer Co.,* 61 Wash. 141, says:

"There is no dispute as to the order given by the foreman; that it was given is conceded by all of the witnesses, the only dispute being as to the time that elapsed after it was given and before the mill started.

The order being given, *it was respondent's duty to promptly obey.* He knew this duty and that he was subject to the commands of the foreman."

In *Cox v. Coal Co.,* 61 Wash. 347:

"If Cox had suspicions of danger, he was not free to act upon them. He had been called by one in authority over him, and told the place was safe. *It was his duty to obey the call.*"

Instruction No. 3 is wholly unsupported in law.

Defendant's instruction No. 4 was properly withheld since it is held to be the law that an employer cannot, as a matter of law, defeat the right of an employe to recover merely because the danger encountered was apparent, if the safety and suitableness of the machinery as an appliance is in issue, and

the inexperience, lack of knowledge and failure of warning to the employe is also present.

R. R. Co. v. Linstedt, 106 C. C. A. 238.

The instruction was objectionable also in that it does not come within the rule of law as announced in *Mather v. Rillston*, 156 U. S. #91 (39 L. Ed. 464), that:

"All occupations producing risks of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body or limb it is incumbent upon the promoters thereof and the employer's of others thereon to take *all reasonable and needed precautions* to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted."

Mather v. Rillston, 156 U. S. 391 (39:464).

And it overlooks the rule as laid down in *Deator v. Abrams*, 60 Wash. 1:

"If a man goes to work in a place of open and manifest danger, *if he knows the danger attendant upon his employment*, or ought to know it in the exercise of reasonable care for his own safety, *if he appreciates the risks of danger in his position*, or ought to appreciate them in the exercise of ordinary care and observation on his part, he cannot recover even though injured while at work."

Defendant's instruction No. 5, as submitted, is open to the objection that is in error in stating that plantiff testified that he knew that if caught in them he would be injured, since plaintiff testified in answer to the direct question as to whether he knew that, 'if you put your fingers in them (the cog-wheels) when they were running you would get hurt—answer that yes or no—just answer it yes or no." "*I never knew.*"

Transcript, page 40.

And also, for the reason that when he assumed the work of oiling this machinery he did not assume the risk unless he knew of and appreciated the danger.

Doyle v. R. R. Co., 43 Wash. 563.
Allen v. Gilman, etc., 127 Fed. 609.
R. R. vs. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464).
Lahti v. Rothchild, 60 Wash. 438.
Deator v. Abrams, 60 Wash. 1.
R. R. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
R. R. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
R. R. v. Jarvi, 53 Fed. 65.
R. R. v. Van Pelt, 93 C. C. A. 492.

Regarding instruction No. 8, it may be said that the same principles were no less cogently stated by the Court in its instruction, "that persons and companies in industrial enterprises where machinery and dangerous appliances are employed have a right to employ workmen to assist in carrying on the work, and an employe who enters upon such employment is by the law charged with the assumption of the risks of the employment, and I mean by that the necessary dangers that are incident to the use of the machinery and the dangerous appliances, to him, the person working around and with them. Now, the employe who voluntarily enters upon that kind of employment is charged with the assumption of the risk of dangers that are necessarily and ordinarily incident to the employment, and in addition to that those dangers which are obvious so that they must be observed by an employe who is exercising care, and observant to avoid danger. The obvious dangers are assumed by the employe, and in addition to that any other dangers that are incident to the employment of which he has actual knowledge. The employe is not required by the law to assume the risk of dangers which are concealed and which he does not know of—he is not required to search for dangers, but he is required to be alert and vigilant to observe when they are fully exposed. If a man is injured as a consequence of exposing himself to contact with operating machinery that is dangerous and the dangers are visible and

such that a person of ordinary intelligence would see and appreciate, it would afford him no ground for a claim for damages against his employer if he gets hurt by them."

Then, error for refusal to charge in certain language cannot be assigned where the same idea is set forth in different language and equally as well understood by the jury.

The opinion in *Hall v. Lumber Co.*, 61 Wash. 355, says:

"As we have often said, it is not necessary that the Court give to the jury a requested instruction in the language in which it is presented; it is sufficient if the instruction is given in substance."

"Courts are not bound to give instructions upon specific requests by counsel for them. If the Courts charge the jury rightly upon the case generally, it has done all that it ought to do."

Mills v. Smith, 8 Wall 27 (19 L. Ed. 346).

"The Court may reject the language of the request."

R. R. v. Cody, 166 U. S. 606 (41 L. Ed. 1132).
Co. v. Chessman, 116 U. S. 528 (29 L. Ed. 712).

Defendant's requested instruction No. 9 is too broad, and is not limited to the established rule of the law.

It is held that an employe "*is not charged with contributory negligence simply because he sees and knows the defects*, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which these defects indicate."

The dangers and defects merely must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence."

R. R. Co. v. Jarvi, 53 Fed. Rep. 65, C. C. A. 433, cited in 18 subsequent cases.

Allen v. Gilman, 127 Fed. 609, says:

"The mere fact that the employe *knows* that there is danger will not defeat his right to recover if in obeying he acted with ordinary care under the circumstances."

And in *Cook v. Lumber Co.*, 61 Wash. 122, it is said, that an employe is to be held guilty of negligence because,

"He, as men of ordinary understanding and common prudence will do at times, obeyed the impulse of his mind to reach over and clear the chain."

With respect to defendant's objection to the charge of the Court to the jury, as specified in paragraph 10 of its motion, no error was committed in leaving to the jury the determination of whether or not the defendant had furnished a safe place in which for the plaintiff to work. It was a question of fact, going to the negligence of the defendant, and as such, was for the jury, under the ruling of the U. S. S. C. in *Davidson v. S. S. Co.*, 205 U. S. 187 (51-764), wherein it is said:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair minded men will honestly draw different conclusions from them."

Sioux City v. Stonp, 17 Wall 657 (21 L. Ed. 745).
R. R. v. McDade, 135 U. S. 554 (34 L. Ed. 235).
R. R. v. Converse, 139 U. S. 469 (35 L. Ed. 213).

From these authorities, and many more, of a kindred nature could be cited, it is obvious that the question for us to consider is whether there was testimony from which the jury might rightfully find the defendant guilty of negligence."

Also *Clow & Sons, v. Holtz*, 34 C. C. A. 550 (92 Fed. 572).
Cox v. Coal Co., 61 Wash. 347.
R. R. v. Linstedt, 106 C. C. A. 238.

Whether or not the plaintiff assumed the risk, or waived the doctrine of "safe place" was properly for the jury, with proper instructions from the Court, which instruction was rightly given.

Transcript, page 112.

Relative to the objection as set forth in paragraph 12 of the motion, attention is directed to the opinion in *R. R. Co. v. Cumberland*, 176 U. S. 232 (44 L. Ed. 447):

"In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. * * * The plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another."

In view of the law as set forth herein, and the facts in the case at bar, the plaintiff submits that the motion now under consideration should be denied.

HERBERT W. MEYERS,
CHARLES A. ENSLOW.

Filed U. S. Circuit Court. Western District of Washington, Oct. 25, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,*
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*
No. 1934.

PLAINTIFF'S BRIEF ON WORD "ANY" USED IN INSTRUCTION AND ON SUFFICIENCY OF PLEADINGS.

Upon the argument of the motion for judgment *non obstante veredicto* and for new trial, the Court withheld its decision pending a showing by the plaintiff that the instruction as given to the jury, that:

"If you find from the evidence that the injuries occurred by reason of *any negligence* on the part of the defendant company, then the plaintiff is entitled to recover, unless it affirmatively appears by the preponderance of evidence on that point that he was himself guilty of such negligence as to be the proximate cause of the injuries he suffered."

was not prejudicial to the defendent by reason of the use of the words "any negligence." This raises the question of the ambiguity of the instruction, in that it questions the real meaning of it, as well as the effect of it upon the jury.

It is especially called to the attention of the Court that the correctness of this instruction was not challenged, nor any exception to it noted at the time it was given by the Court; but that it is now raised by the Court, on its own initiative, after trial and verdict for the plaintiff. No exception was noted to it by the defendant.

It is submitted, that, whatever action the Court may take, the defendant cannot now be permitted to have the advantage of an exception *other than such as he noted at the trial*, in view of the rule which obtains in both the Federal and the State practice.

In *Improvement Company v. Munson*, 14 Wall, 442 (20 L. Ed. 872), it is stated to be the rule that:

"If the charge is merely ambiguous, the party dissatisfied with it should have requested to have it made clear *before the jury left the bar;* that a party under such circumstances may not acquiesce in the correctness of the instruction by his silence and take his chance with the jury, and then be allowed, after verdict is given against him, to claim the benefit of the ambiguity without having invited attention to the subject and given the Court an opportunity to have made the correction to the jury."

It is held that instructions given by the Court at the trial are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies *not pointed out by the excepting party.*

Congress Springs Company v. Edgar, 99 U. S. 645 (25 L. Ed. 487), holds:

"In examining the charge of the Court, for the purpose of ascertaining its correctness in point of law, *the whole scope* and bearing of it must be taken together. It is wholly inadmissible to take up a *single and detached passages* and decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions.

Maynac v. Thompson, 7 Peters 348.

Instructions given by the Court at the trial are entitled to a reasonable interpretation, and if the *proposition* as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies *not pointed* out by the excepting party.

Castle v. Bullard, 23 Howard 172 (16 L. Ed. 424).

Appellate Courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, *where it appears that the complaining party made no effort at the trial to have the matter explained.*

Locke v. U. S., 2 Cliff. 574.
Smith v. McNamara, 4 Lans. 169.

Requests for such purpose may be made *at the close of the charge* to call attention of the judge to the supposed error, inaccuracy or ambiguity of expression; *and where nothing of the kind is done, the judgment will not be reversed,* unless the Court is of the opinion that the jury were misled or wrongfully directed.

Carver v. Jackson, 4 Peters 1.
White v. McLean, 57 N. Y. 670.

And, in *Pacific Express Company v. Milan, et al.,* 132 U. S. 531 (33 L. Ed. 450):

"While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken *before the jury withdrew from the bar.*"

Thiede v. Utah, 159 U. S. 531 (40 L. Ed. 237).
United States v. Carey, 110 U. S. 81 (28 L. Ed. 67).
Phelps v. Mayer, 15 Howard 160.

Stanton v. Embry, 93 U. S. 555.
Hunnicutt v. Peyton, 102 U. S. 354.

In the case of *Michigan Insurance Bank v. Eldred*, 143 U. S. 293 (36 L. Ed. 162), the Supreme Court of the United States said:

"By the uniform course of decisions, no exception to rulings at a trial can be considered by this Court unless they were taken at the trial."

And the Court says further, in the same opinion:

"The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the Court; the trial Court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth."

Such is the rule of the Federal Courts.

The defendant here did not offer objection nor note exception to any instruction other than that relating to the measure of damages, and cannot now have the advantage of any other exception, under the rule of the Supreme Court of the State of Washington, as announced in the case of *Coffey v. Seattle Electric Company*, 59 Wash. 686, where it is said:

"They must still be taken by stating the same to the trial judge, and by him noted in the minutes of the court or embodied in the record of the cause by the stenographer taking such record. *Otherwise they are not proper exceptions and of no value to a litigant, either in the court below or here.* Such is unquestionably the rule."

And, in *Gerber v. Aetna Indemnity Company*, 61 Wash. 184:

"We cannot hold, when during the argument upon a legal contention counsel indicates to the Court his contention that the Court is about to make an erroneous ruling, that such expression of counsel's views will operate as, and take the place of, an exception to the ruling. Exceptions, and the manner of taking them, are controlled by statute, and before beneficial the statutory requirement must be followed."

Since the defendant has no right to question the correctness of the instruction which has been called in question by

the Court, and cannot take advantage of it on appeal to the Circuit Court of Appeals, the Court should not require the plaintiff to defend the correctness of the instruction, unless it be for the reason that the Court itself believes the jury were misled or wrongfully instructed, to the extent of prejudicing the right of the defendant.

When the Court itself, the attorneys for the plaintiff, who earnestly desired that no erroneous instruction be given, and the astute counsel for the defense, who is so experienced in detecting defects in all pleadings and instructions, did not notice the small word "any" in the instruction given; and when the Supreme Court of the United States have reversed a case from the Circuit Court of Appeals of the Ninth Circuit, and in doing so commended an instruction embodying the same word in a relation to other words so as to make it far more objectionable than as the word was used here, can it be said that the jury in this case seized upon that word and acted upon it, and thereby prejudiced the defendant in any manner?

In the opinion in *Railroad Company v. Poinier*, 167 U. S. 48 (42 L. Ed. 72), to which reference is made next above, it is said:

"Accordingly we think that the defendant was entitled to have had the following instruction given to the jury: 'If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by not keeping the extra train in proper control, *or by any other act or neglect* of the engineer or conductor of the first train, then I instruct you that the defendants are not liable, and you should return a verdict for the defendants."

This case indicates that the Supreme Court of the United States did not place such a refinement upon the use of language as is sought to be placed upon it here, and had no reason to believe that the other party in the action would be prejudiced by the use of the words "any neglect."

A case directly in point, and absolutely on all fours with the case at bar, will be found in 61 Wash. 213, styled *Starck v. Washington Union Coal Co.*, wherein it says:

"Instruction No. 16, given by the Court, was as follows: 'You are instructed that one of the defenses set forth in the answer is that the dangers of the working place where plaintiff claims to have been injured were open and apparent to him, and that by working in said place he assumed the risk thereof. I instruct you that if you find from the evidence that defendant performed its statutory duty, as hereinbefore defined, to you in these instructions, and was not guilty of *any negligence,* and that there still remained a peril and risk to the plaintiff, at said working place, and that the same was open and apparent to plaintiff or known to him, or that he had such notice thereof that a man of ordinary prudence under like circumstances would have discovered such danger, then plaintiff did assume the risks of such danger, and if he was thereby injured he has no redress; but if you find from the evidence that the danger to the plaintiff at said working place, if any, was caused by the neglect of the defendant to perform its said statutory duty, if it did fail to perform the statutory duty, and that it was by reason of such negligence that plaintiff was injured, if he was injured, then you are instructed that plaintiff did not assume the risk of injury through such neglect.'

It seems to us that the appellant's rights were guarded in an exceedingly liberal manner in this instruction, and that the only objection that can be raised to it is the *very technical* objection as to the use of the word 'any' in the early part of the instruction. It is contended by the appellant that there was no other negligence than the negligence of neglecting to perform its statutory duty in relation to the furnishing of props, and that under the instruction the Court authorized the jury to consider the question whether the appellant had been guilty of some other negligence, thereby authorizing the jury to take into consideration a fact that was not in the pleadings, and particularly not in the evidence; and that the instruction was therefore erroneous.

But we think this is too narrow a construction to place upon this instruction. There was probably an unfortunate use of the word 'any,' but we think the jury well understood when the Court said: 'I instruct you if you find from the evidence

that the defendant performed its statutory duty as hereinbefore defined to you in these instructions, and was not guilty of any negligence,' that the Court had reference not to any other negligence, but any negligence in not performing its statutory duty as thereinbefore defined.

If judgment were reversed for every little mistake made in the use of language by courts while instructing juries, the wheels of justice would be effectually blocked."

Whether or not the reasoning of this case would appeal to the Circuit Court of Appeals of the Ninth Circuit cannot be stated until it is presented to them squarely, but that it would meet with approval of those judges of law and equity can hardly be doubted, since it is so well grounded upon the principles of ordinary justice.

In another case in the Supreme Court of Illinois, *Railroad Company v. Musa*, reported in 54 Northwestern Reporter 168, the Court had the same proposition before it, and used this language

"The complaint that the first and second instructions on behalf of the appellee authorized the jury to find for the appellee if they believed from the evidence that the servants of the appellant company were guilty of *any negligence*, without restricting the right of recovery to the negligence charged in the declaration, would not be without force, if negligence other than that charged in the declaration had in any way been disclosed to the jury. The facts made to appear by proof did not tend to establish or raise a presumption that the servants of the company had been derelict otherwise than as alleged in the declaration. * * * Moreover, the jury were distinctly advised in other instructions that it was essential to a right of recovery that the evidence should show that the appellant company was guilty of negligence as charged in the declaration."

The Court of Civil Appeals of the State of Texas passed upon the same question in *Railroad Company v. Burns*, 91 Southwestern Reporter 618, and said:

"The sixth assignment complains of the following paragraph of the charge: 'If you believe from the evidence that the plaintiff was guilty of *any negligence*, which caused or contributed to his injury, if any, then he cannot recover.' This is said

to be an incomplete statement of the rule, and not accurate, in this: That the rule of contributory negligence calls for more; that is to say, if plaintiff omitted anything which an ordinarily prudent person would have done to prevent the accident, he would not be allowed to recover. * * * *There is no force whatever in the criticism of the charge. It stated the rule sufficiently.* The charge elsewhere gave a correct definition of negligence and also ordinary care."

The Supreme Court of Kansas, in construing a statute of that state in which the words "any negligence" occurred, in the case of *Railroad Company v. Brown*, 24 Pacific Reporter 497, said:

"The statute relied on by the plaintiff uses the words 'any negligence,' and, in so using the same, it undoubtedly means any culpable negligence, or any negligence above what is permissible. Or, in other words, it means a want of that degree of care required *in the particular instance*."

The Court of Civil Appeals of Texas, in *Taylor v. Warner*, 60 Southwestern Reporter 442, passed upon the use of the words, and said:

"The eighth and ninth assignments of error complain of the use of the word 'any' instead of 'a' in defining negligence and care and diligence, as 'any reasonably prudent man' instead of 'a reasonably prudent man'; that it imposes a higher degree of care upon the defendant than the law warrants. We do not think the distinction well made."

Since judges learned in the law, and with the matter pointed out and distinctly before them, are unanimous in the declaration that the use of the words "any negligence" is not misleading or prejudicial, it is preposterous to suppose that a jury, hearing the words among hundreds of others no less important, would single them out and give to them a wrong meaning.

The Supreme Court of the United States, in *Standard Oil Company v. Brown*, 218 U. S. 78 (54 L. Ed. 939), has well stated the probable action of the jury in cases where the distinguishing of the meaning of similar words is left to them in instructions, the case referring to the substitution of the word "would" for "could" by the Court, wherein it says:

"But little comment is needed on the contention that there is reversible error in the action of the Court.

It would be going very far to reverse the judgment on the *supposition* that the jury would have seen a different meaning in the word 'could' than they saw in the word 'would,' and in consequence would have imputed a greater knowledge to the defendant in error of the risks of his employment."

The action of the Court in this present case, should it hold that the jury were influenced to the prejudice of the defendant by the use of the word "any" must be taken purely upon the *supposition*, unsupported by evidence, that the jury were so influenced, and we submit that the ends of justice do not require the granting of the motion of the defendant upon a mere supposition entirely unsupported by any fact.

The entire charge of the Court tends to bring the minds of the jury to the appreciation of the fact that the decision must be made upon the evidence before them, and not upon extraneous matters; and the sentence next preceding the one now in question refers specifically to the facts "from which the jury will judge as to whether there was negligence or not," and then the jury are told in the same sentence in which "any negligence" occurs that there must be "*a preponderance of the evidence on that point.*" To hold that they did not comprehend the meaning of the words would be to impeach the intelligence of the jury. There is nothing in the entire charge which has a tendency to take the minds of the jury away from the facts shown by the evidence to be in issue in the case, and there is nothing in evidence over the objection of defendant with exception noted.

Instructions are to be given a reasonable interpretation, and are to be construed as a whole, and this rule obtains in both the State and Federal practice. In support of this statement reference is made to the case of *Spring Company v. Edgar*, cited and quoted on page 1 of this brief, in addition to which the Supreme Court of the United States, in *Magniac v. Thomson*, 7 Peters 348 (8 L. Ed. 709), says:

"The question now before the court is, whether the charge to the jury in the Circuit Court contains any erroneous statements of the law; in examining it, for the purpose of ascertain-

ing its correctness, the whole scope and bearing of it must be taken together; it is wholly inadmissible, to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge; the whole is to be construed as it must have been understood, both by the Court and the jury, at the time it was delivered."

And in *Evanston v. Gunn*, 99 U. S. 660 (25 L. Ed. 306), it is held that where the charge to the jury taken as a whole fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification.

Railroad v. Holloway, 191 U. S. 334 (48 L. Ed. 207).
Bird v. U. S., 187 U. S. 118 (47 L. Ed. 1175).

The Supreme Court of the State of Washington announced the rule in the case of *Roberts v. Mill Company*, 30 Wash. 25, thus:

"*The whole instruction must be construed together.* So construed, it was not error. It is true that this sentence is not technically correct; but this error is not of moment, especially when the intent of the whole is clearly expressed that the burden is upon the plaintiff to prove negligence. This Court has frequently held that where an isolated portion of an instruction standing alone may be technically erroneous, yet if the whole instruction, taken together, fairly stated the law, it will be upheld."

Company v. Seattle, 6. Wash. 101.
Duggan v. Company, 6. Wash. 593.
McQuillan v. Seattle, 13 Wash. 600.
State v. Surry, 23 Wash. 246.
Miller v. Dumond, 24 Wash. 648.

When taken as a whole, the instructions given in this case are clearly not such as can properly be said to in any way prejudice the rights of the defendant in any way.

That they must have been so considered by the defendant is evidenced by the fact of its failure to note exception to them at the time of the trial. It should not now be heard to com-

plain of them. It cannot take advantage of the defect complained of, upon appeal.

In a supplemental brief, the defendant challenges the sufficiency of the complaint, and points out that the sole ground of negligence alleged in the complaint is:

"That the carelessness and negligence aforesaid consists of failing to provide and maintain reasonable safe guards for the aforesaid cogs, shafts and gearing,"

and it is objected that the Court submitted the case to the jury upon the theory that it was the duty of the defendant to have furnished the plaintiff a safe place in which to work, but that it is not alleged in the complaint that the place furnished the plaintiff was unsafe.

Undoubtedly, this objection is more to the form than to the substance of the complaint, since, in paragraph IV of the complaint, it is alleged that:

"The defendant, on or about the said date, and prior thereto, failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected."

It is submitted that this paragraph sufficiently alleges the fact that the place in which the plaintiff was directed to work when the injury to him occurred, without another allegation in specific words, and that the facts alleged are ample upon which to found the conclusion of law that the place was unsafe.

An examination of the record in this case will disclose the fact that no objection was made to the sufficiency of the complaint to support proof of the unsafe condition of the place; that no objection was made or exception noted to the admission of evidence upon that point; that no motion to strike or exclude such evidence was made, and it is submitted that, after verdict, the defendant cannot be heard to question the sufficiency of the complaint in that regard.

The Circuit Court of Appeals, Ninth Circuit, in the case of *Shea v. Nilima*, 133 Fed. 209, said with respect to the sufficiency of the allegations in a complaint:

"The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by rea-

sonable intendment from the matters which are set forth, although the allegations of the facts are imperfect, incomplete, and defective—such insufficiency pertaining, however, to form rather than to the substance—the proper mode of correction is not by demurrer, nor by excluding the evidence at the trial, but by motion before trial to make the averments more definite and certain by amendment. * * * Instead of alleging issuable facts, the pleader should state the evidence of such facts, or even a portion thereof only, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law in place of facts, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by motion, and not by demurrer."

Thompson, in his work on Negligence, S 7527, says:

"The complaint for injuries caused by a failure of the master to furnish a safe place to work should set out the facts showing wherein the danger consisted and the casual connection between the defective place and the injury."

Lanter v. Duckworth, 19 Ind. App. 535 (48 L. Ed. 86).
Preston v. Railroad, 84 Ga. 588 (11 S. E. 143).

Hence, it would seem unnecessary to allege in specific words the fact that it was the duty of the master to furnish a safe place for employes, since that is a conclusion of law which arises from the statement of the necessary facts from which it may be inferred in a given instance.

In *Walla Walla v. Water Company*, 172 U. S. 1 (43 L. Ed. 341), it is said:

"That which is patent to anyone of average understanding need not be particularly averred."

And it is a general rule that facts, not legal conclusions, should be alleged in pleadings.

Cambers v. Bank, 156 Fed. 482 (84 C. C. A. 292).
Company v. Barnett, 144 Fed. 338 (75 C. C. A. 300).

In *Alabama v. Burr*, 115 U. S. 413 (29 L. Ed. 435), the United States Supreme Court said:

"Pleadings must state facts, and not conclusions of law merely. If the facts from which the conclusion is drawn are

not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad."

The Supreme Court of Washington, in *Harris v. Halverson*, 23 Wash. 782, says:

"The true doctrine is that every reasonable intendment and presumption is to be made in favor of the pleading, and if the substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of the facts are conclusions of law, or otherwise imperfect, incomplete and defective, such insufficiency pertaining to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding the evidence at the trial, but by motion before the trial to make the averments more definite and certain by amendment."

following the Circuit Court of Appeals in *Shea v. Nilima, supra.*

Not only will the Court give full effect to the intendments of the pleader as indicated by the allegations of the complaint, but, as stated in *Collins v. Denny Clay Company*, 41 Wash. 136, the complaint will be considered amended to conform to the facts proved:

"Objection is made to the sufficiency of the complaint to sustain the judgment, as rendered against some of the appellants, but the proofs were received without objection, and the Court will consider the complaint amended, if need be, to conform to the facts proved."

In *Meade v. Murray*, 5 Wash. 693, it is held:

"The Court, on motion for a non suit, ought to consider the complaint amended to correspond to the facts proved, where there is a variance between the proof and the complaint, and the proof has been received without objection."

In *State v. Indemnity Association*, 18 Wash. 514:

"A motion for a non suit on the ground that the complaint failed to state a cause of action was properly denied, where there was no demurrer and the defect had been cured by the admission of proof without objection."

In *Cribben v. Callaghan*, 156 Illinois 549 (41 N. E. 179), this language is used:

"After verdict, on a motion in arrest of judgment, the Court will intend that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial. After verdict, judgment will not be arrested for any defect in the declaration which, by reasonable intendment, must be considered to have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration.

Morey v. Homan, 10 Vt. 565, and other cases in note A to 2 Tidd, Prac., p. 919.

Where the plaintiff states his cause of action defectively, it will be presumed after verdict that all circumstances necessary, in form or substance, to complete the title so defectively stated, were proved at the trial, as they must have been proved in order to entitle the plaintiff to recover. 2 Tidd, Prac. p. 919. * * * But while we have discussed the case as though the allegation of duty was a material one, it is to be remembered that really it is unnecessary to allege that a certain act or line of conduct is a duty, because the law implies the duty from the facts stated. A conclusion of law need not be pleaded.

Railway v. Coit, 50 Ill. App. 640."

An allegation of duty in words in an action for negligence is always surplusage, since, if the facts stated raise the duty, the allegation is unnecessary; if they do not, it is unavailing.

Matz v. Railway Co., 88 Fed. 770.
Chicago v. Apel, 50 Ill. App. 132.
Clyne v. Helmes, 61 N. J. L. 358 (39 Atl. 767).
Sammin v. Wilhelm, 6 Ohio C. C. 565.
Hewson v. New Haven, 34 Conn. 136 (91 Am. Dec. 718).
Railway Co. v. Burton, 97 Ala. 240 (12 So. 88).

In the case of *Nashua Savings Bank v. Company*, 189 U. S. 221 (47 L. Ed. 786), the Supreme Court said with respect to an alleged insufficient complaint:

"The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit, and no objection was made to the evidence offered on the ground of variance.* Under such circumstances, and without expressing an opinion as to the

admissibility of the evidence offered, *the declaration is good after verdict.* In *Roberts v. Graham*, 6 Wallace 578 (18 L. Ed. 791), we held that variances between allegations and proof must be taken when the evidence is offered, and if the evidence be sufficient to support the verdict *the defect in the declaration is cured.*

Patrick v. Graham, 132 U. S. 627 (33 L. Ed. 460)."

In *Bonne v. Company*, 35 Washington 696, the Court, in the opinion, said with respect to objection to pleading:

"At the trial when the respondents commenced the introduction of evidence it for the first time made the objection. This, as we have repeatedly held, was too late to take advantage of any technical defect in the complaint; there must be a defect in substance, incapable of being cured by amendment, before courts will hold the complaint bad when the objection is raised on the trial for the first time. * * * At most they are but technical defects and omissions which can be cured by amendment, and will now, inasmuch as they were not suggested in time, *be deemed corrected by amendment.*"

Having shown that the defendant is without right in law to object at this time to the sufficiency of the complaint, as well as to the instructions, other than as objected to in time, and that reasonable minds have not been impressed with the fact that the use of the words "any negligence" in any manner prejudices the rights of litigants, we submit that the motion for judgment *non obstante* and for a new trial should be denied.

Oct. 30, 1911.

HERBERT W. MEYERS,
CHARLES A. ENSLOW,
Attorneys for Plaintiff.

Indorsed: Plaintiff's Brief on word "any" used in instruction and on sufficiency of pleading. Filed U. S. Circuit Court, Western District of Washington, Oct. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Appellant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Respondent.
No. 1934.

SUPPLEMENTAL BRIEF OF RESPONDENT.

As pointed out in the argument on motion for new trial, the sole ground of negligence alleged in the complaint is found in Paragraph VI in the following language:

"That the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safe-guards for the aforesaid cogs, shafts and gearing."

This Court submitted the case to the jury upon the theory that it was the duty of the defendant to have furnished the plaintiff a safe place in which to work, Your Honor stating as follows:

"Failure to exercise due care to make the place *and the surroundings* reasonably safe for employes is a negligence of duty which is a legal wrong and when an injury is suffered in consequence of that kind of wrong, the employer is liable on the principle of rendering compensation for an injury suffered in consequence of his wrongful conduct."

Again Your Honor stated:

"If you find from the evidence that the injuries occurred by reason of *any* negligence on the part of the defendant company, then the plaintiff is entitled to recover, unless it affirmatively appears that he was guilty of contributory negligence," etc.

Your Honor will remember that in the trial of the case the plaintiff was permitted, over defendant's objection, (S. F. p. 7) to show that he was not warned of the danger, the question propounded being:

"Q. What were you told, if anything, about the motor or gravel machine when you went to work on the motor?

Objected to. Objection overruled.

"A. They told him nothing about the gravel machine, just told him to go to work on the motor."

The Court will remember that it was strenuously contended in the argument that the platform upon which plaintiff stood in oiling the machinery was exceedingly narrow and that it was elevated above the surface of the ground, and that the structure itself was elevated and a difficult place for employes to work from. The question of surroundings, which the Court instructed the jury it was the duty of the employer to make reasonably safe was not an issue in the case at all. It is not even alleged that the place furnished the plaintiff was an unsafe place in which to perform his work, and if the allegations of the complaint are broad enough to involve the doctrine "Safe Place," it is involved only in the proposition that the cogs themselves were not guarded and not in the idea that the surroundings of the cogs were in any manner defective or unsafe. The expression used in the Court's instruction

"If you find from the evidence that the injury occurred by reason of *any* negligence"

must necessarily have left to the jury to determine at their own whim whether the structure itself, the platform or the surroundings were, in any manner, unsafe. The plaintiff was engaged with others in constructing a foundation for a power house in the canon at Snoqualmie Falls and this structure was located on the steep side of the canon. The gravel was elevated to the washing machine by means of tramroads with a steep grade, and when washed passed down a chute to the foundation that was being installed.

The whole equipment was a purely temporary one used in the construction of this power house foundation and was in no sense a permanent piece of machinery. Under the issues the sole question, if it was a question, to go to the jury was related solely to the cog-wheels, not to the surroundings. The Court's instruction permitted the jury to go outside of the issues to base its verdict upon anything. The jury may have found in the conduct of the defendant, or in the character of the super-

structure, or the place where the plaintiff was required to go something it would deem to have been an improper or unsafe construction. In *Panton v. Ballard*, 24 Tex. 620, the Court holds that a judgment must be reversed if the jury may have been misled by the charge, although there were grounds at issue upon which the verdict might have been based.

In *Williams v. Conger*, 49 Tex. 493, it is held that a judgment will be reversed where an improper issue has been submitted to the jury and where it cannot be seen from the record that the jury may have found a verdict on such issue, although the verdict in the law and testimony was correctly found upon the merits. In *Sabin v. Cameron*, 117 N. W. 95, the Court says:

"The rule is well established in this court that it is prejudicial error to submit to the jury an issue not raised by the pleadings or evidence."

In *Hudson v. Morris*, 55 Tex. 595, the Court said:

"Where the action of the Court in instructing the jury is clearly erroneous and calculated to mislead the jury to a wrong result to the injury of the party, in order to sustain the judgment which follows it, it ought to be clear that such a consequence did not in fact ensue from the error."

To the same effect is the case of *Railroad Company v. Greenlea*, 62 Tex. 345. In *Perro v. Cooper*, 28 Pac. 391, it is held that an instruction, even though correct as a proposition of law, is misleading as to the issues, inapplicable to the evidence and calculated to prejudice the rights of the losing party, cannot be held to be harmless error.

The only legal wrong alleged was the failure to guard the cog-wheels and no complaint is made of the surroundings, or of the superstructure, or of the platform. If the Court is right in assuming that the question at issue was the mixed question of law and fact, the issue pertains solely to the guarding of the cog-wheels, and the Court should not have left it to the whim of the jury to have concluded from the testimony and an examination of the exhibits; and, considering the nature of the structure, the place of its location, means of access to it, that the plan and character of the structure itself was not reasonably safe—certainly under the general instruction that if the jury should find that the plaintiff was injured by reason of

any negligence the jury was given free scope to find the verdict for the plaintiff, regardless of the Court's instructions as to assumed risk and contributory negligence in the light of undisputed testimony that the plaintiff himself knew and fully understood the risk.

The Court will remember that it was contended in argument that the plaintiff had had no experience in working about machinery; that he did not understand the English language, and that he was an inexperienced foreigner. Complaint was made that he had not been instructed as to the dangers of oiling this machinery. Your Honor stated in the instructions as follows:

"You should require him to exercise only such faculties and capacities as he is endowed with by nature for the avoidance of danger."

Again:

"The law does, as I have stated, impose upon him only the degree of vigilance that a person of his natural capacity considering his age, his experience and his brightness of intellect and everything of that kind is to be taken into account and he is chargeable with the consequences of those dangers that would necessarily be apparent to him—to a man of his capacities."

Under the general instruction permitting the jury to find defendant guilty if they found it was guilty of any negligence, the jury may well have concluded that on account of this man's lack of experience he should have been warned. There was no issue of that kind in the complaint. Again, the complaint is directed solely to the cog-wheels and is accordingly a complaint of the condition of an appliance and not of place, and in the Court's instructions, in referring to "Safe Place" the jury were instructed that it was the duty of the master to have safe appliances and a safe place to work.

Respectfully submitted,

KERR & McCORD,

Attorneys for Respondent.

Indorsed: Supplemental Brief of Respondent. Filed U. S. Circuit Court, Western District of Washington, Oct. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This matter coming on the 1st day of November, 1911, on the request of counsel for plaintiff, and the Court believing that counsel for plaintiff should be heard further in the matter of the Court's decision on the motion for new trial as filed by Kerr & McCord, for defendants,

IT IS ORDERED, ADJUDGED AND DECREED that a rehearing be had on said motion for new trial and that counsel for plaintiff be heard on said motion on November 6th, 1911.

DONE IN OPEN COURT this 1st day of November, 1911.

C. H. HANFORD, Judge.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

PETITION FOR REHEARING.

To the Honorable Cornelius H. Hanford, Judge of the United States Circuit Court for the Western District of Washington, Northern Division:

The petitioner, Herbert W. Meyers, attorney for plaintiff, respectfully represents to the Court, and asks for a rehearing on

the matter of the Court's ruling on defendant's motion for a new trial heard on October 30, 1911, on the following grounds:

I.

The Court should not have heard the defendant nor have permitted him to file a brief on any subject except the use of the word "any" in the Court's instructions.

On October 23, 1911, the Court, after stating that he would not grant a new trial on any of the grounds mentioned and after attorney for defendant had finished his argument, addressed counsel for plaintiff as follows: "Mr. Meyers, I do not wish to hear from you on any subject except the use of the word 'any.' I believe I erred in giving an instruction containing that word, and it is for you to show me that it is not error to use that word in that way." "The Court did, however, instruct the jury it was not for negligence in general that defendant would be held. I believe the instruction contained an error which I did not catch at the time. The instruction was, "if you find from the evidence that the injuries occurred by reason of any negligence." When the reporter showed me a copy of the charge, I marked out 'any,' thinking that I did not say that, but on reading the charge requested by the defendant, I found the word 'any.' On this point that I have indicated, that where the instructions are inconsistent, whether the verdict can be sustained————, but where the case is left to the jury to find out in their own way which is error and which is correct, an erroneous instruction is reversible error. I would not be willing to grant this motion if the records showed that the case had been submitted to the jury upon *instructions which were not in error.*"

II.

The Court should not have considered any other matter except the use of the word "any" in ruling on the motion for new trial.

Counsel for plaintiff took the Court's statement that the word "any" was the only error which he saw which might be reversible.

III.

The Court should not have taken into consideration any matters on which the plaintiff was not heard and should not have been influenced by any matters which were not open for consideration under the Court's previous ruling.

IV.

The Court should not have allowed counsel for defendant to bring matters of pleading up after verdict, after stating that nothing was in issue except the use of the word "any."

V.

The Court should not have allowed defendant to be heard on the matter of instructions given by the Court which were not objected to by counsel for defendant at the time of trial, and which cannot be objected to after verdict unless such objection has been taken.

VI.

The Court should not have been influenced by the amount of the verdict, after telling counsel that the use of the word "any" was probable error and that was the only ground upon which he would grant a new trial.

VII.

The Court should not have considered the matter of excessive verdict without having given plaintiff an opportunity to be heard, and then, if the matter of an excessive verdict was in any way considered, the same should have been reduced by the Court in accordance with the Court's opinion as to what an adequate compensation for the injuries suffered would have been.

These matters, and others pertinent thereto, the petitioner respectfully prays may receive the consideration of this honorable court in conjunction with his brief hereinbefore filed on the subject of the use of the word "any" and the pleadings, and for that purpose your petitioner asks that a rehearing be granted and that said order be stayed or set aside, pending the hearing under this petition.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Herbert W. Meyers, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read the said petition, knows the contents thereof, and the same is true as he verily believes.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 1st day of November, 1911.

(Seal) H. BALLINGER,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Order for Rehearing of Motion for New Trial. Filed U. S. Circuit Court, Western District of Washington, Nov. 1, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Appellant,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Respondent.*	No. 1934. Order.

This cause coming on to be heard on the motion of Kerr & McCord, attorneys for the defendant, for judgment notwithstanding the verdict and in the alternative for a new trial, Herbert W. Meyers appearing as counsel for the plaintiff, and Kerr & McCord as counsel for the defendant, said cause was argued to the Court on to-wit, the 23rd day of October, 1911, and by the Court taken under advisement, and now, to-wit, on this 30th day of October, A. D. 1911, the Court, having consid-

ered the argument of counsel and the briefs filed in said cause, and being now well and sufficiently advised in the premises, does hereby

ORDER, ADJUDGE and DECREE that the defendant's motion for judgment notwithstanding the verdict be and the same is hereby overruled.

It is by the Court further ORDERED, ADJUDGED and DECREED that the defendant's motion for a new trial be and the same is hereby granted and the judgment hereby entered on the verdict herein is hereby set aside and held for naught, to which ruling of the Court counsel for plaintiff duly excepts, and the exception is duly allowed.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 6, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

SUPPLEMENTAL BRIEF OF PLAINTIFF.

OBJECTION OF DEFENDANT TOO LATE.

The Court, by referring to plaintiff's brief, will see that the objections made by defendant came too late. United States Supreme Court cases and late cases from the Ninth and other circuits, as well as late cases from the State of Washington, will be found, indicating that objections to instructions cannot

be made after verdict if said instructions were not objected to at the time of trial. It will also be noted that objections to pleadings come too late when made after verdict, and it will likewise be noted that if there is a slight discrepancy between the proof and the pleadings, that after verdict the pleadings are presumed to be amended to correspond with the proof.

"ANY."

The Court will see, by referring to plaintiff's brief on this subject, that the United States Supreme Court, the Ninth Circuit and the State Supreme Court, in a case decided less than a year ago had the word "any" used in identically the same way as it was used in the case at bar, and in all three of the courts, the Court will see that it has recently been decided that this is too trivial and too technical an objection to permit the granting of a new trial.

DAMAGES.

The Court should indicate, if he believes that the verdict in this case is excessive, as to what he believes would be ample and proper compensation for plaintiff's injuries. There being no legal grounds on which a new trial can be given, under the decision of our higher courts, the Court should, in all fairness to plaintiff, indicate as to the amount he would be willing to accept rather than to go to the expense of a new trial or an appeal. To save the Court's time as well as the time of the parties interested herein, the plaintiff believes that this should be done.

$12,000 PROPER AMOUNT FOR INJURIES SUSTAINED.

The Court's attention is directed to the fact that there is more than the loss of a right arm in this case. The plaintiff makes allegation of internal injuries in his complaint, and he makes a positive statement in his proof that he has suffered internal injuries and has had pains in his chest ever since the accident. This fact was not disputed by the defendant company. On this subject of the seriousness of the injury, the Court's attention is directed to the following questions and answers as taken from the statement of facts:

24-2 He says that it tore him open here on the chest, right down by the arm.

Is there a scar there still?

Yes, sir.

How much of your chest was torn open by the gravel machine?

All that one side.

How much of a cut was on your face?

All that one side and it gave him quite a few slashes in the face.

Is that scar here the result of that accident?

Yes.

What pains, if any, have you had, since your arm was taken off?

He has pain through his chest *all the time* ever since the accident—through his chest and all on this one side.

Have you any pains in your right stump—right arm, since the accident.

Yes, it pains him very badly, he says, something all the time.

80-11 (Dr. Bruce Elmore) What other injuries, if any, did he receive?

There were several abraisons about the face.

Well, were there any abrasions on the right breast?

There was.

How did he respond?

As far as physical condition goes—of course there was a great deal of shock when I first saw him about two hours after the accident, he was in considerable shock, but after the operation and he was given a salt solution, he rallied very well. He was a strong man and he rallied nicely.

From your experience as a physician, after performing that operation, what would you say as to whether there would be any other ill results following from the loss of that arm, other than the loss of the arm itself, any constitutional injuries resulting from it?

In very few cases would there be any.

I don't understand your question, certainly he had pain.

I show you some scars, doctor, is that approximately where they were?

I know they were in close relation to the arm.

I show you a scar here, is that approximately where the cut or abrasion which you mention was?

I think so, I know it was on the face.

There was considerable blood flowing from the wound was there not?

O, yes.

Considerable blood flowing from his arm and also his face?

Why, he was covered with blood.

104-23 (David Roberts) Is it customary for the company to send you out when men are hurt like this?

In *some cases*, yes, where they are serious.

VERDICT NOT EXCESSIVE, CONSIDERING INJURY.

The United States Government, in its wisdom, in passing its pension legislature, has decided that an arm is worth just as much as a leg. The government pays at the rate of $45.00 a month for the loss of an arm, which would mean $540 a year, or $18,900 for thirty-five years. The insurance companies of the country figure an arm and leg worth the same amount. This man was making $3.00 a day at the time he lost his arm. Allowing him to be away from his work 65 days this would figure up at $900 a year, or approximately $31,000 for this man's expectancy, and figuring that he would make half as much, which he cannot do now, as he would have made before he was injured, this gives a figure of $15,750, and he probably would have lived many years beyond his expectancy.

IF NEW TRIAL GRANTED, APPEAL WOULD HAVE TO BE TAKEN.

If the Court believes, after going into the evidence, that the verdict was excessive, if he will indicate what he believes to be a proper verdict, a new trial and appeal would be averted. This would avoid a long drawn out litigation, perhaps another tedious trial, and a year's delay in a suit which might be settled immediately, if other action were taken.

VERDICT NOT EXCESSIVE.

At page 3669 of Sutherland on Damages, we find this statement:

"There is no absolute rule to determine whether the verdict awards an excessive amount or not. It has been held that if the sum allowed is *much above or greatly below* the average that it is fair to infer, unless the case present extraordinary features, that partiality, prejudice or some other improper motive has led the jury astray. The same reluctance is manifested against setting a verdict aside, because of the inadequacy of the amount awarded as exists where the objection is that the award is excessive. It will be presumed that the jury found every fact to mitigate or reduce the damages which the evidence warranted."

$12,000 Loss of arm. *R. R. v. Randall*, 50 Tex. 254.

$10,000 Loss of arm. *Baltzer v. R. R.*, 89 Wis. 257; 60 N. W. 716.

$1,100 Loss of foot. *Jordan v. R. R.*, 16 Daly 130.

$10,000 Injury one leg and shoulder. 6 Utah 357, 23 Pac. 762.

$10,000 Loss of leg. *R. R. v. Mitchell*, 87 Ky. 327.

$10,000 Loss of leg. *R. R. v. Moore*, 31 Kan. 197; 1 Pac. 644.

$10,000 Loss of leg. *R. R. v. Mackay*, 33 Kan. 298; 6 Pac. 291.

$15,000 Loss of leg and suffering. *R. R. v. Spurney*, 97 Ill App. 570.

$15,000 Fracture of leg. *W. U. Tel. Co. v. Eyler*, 21 C. C. A. 246 (75 Fed. 102).

$12,000 Arm off, head injured. *Renne v. Co.*, 107 Wis. 305; 83 N. W. 473.

$15,000 Injury to right arm, impaired memory, woman. *Morgan v. R. R.*, 95 Calif. 501; 30 Pac. 601.

$15,000 Loss of leg. *Galveston & Co. v. Cooper*, 2 Tex. Civ App. 42; 20 S. W. 990.

$15,000 Arm permanently crippled and surgical operation. *DeWardener v. R. R.*, 37 N. Y. Supp. 123.

$20,000 Portion both legs. *Fonda v. St. Paul*, 77 Minn. 336; 79 N. W. 1043.

$10,500 Foot. *Chapman v. U. Pac.*, 12 Utah 68; 41 Pac. 562.

$11,000 Man 30, earning $540 a year with chance for more. Permanently disabled. *Belair v. Ry. Co.*, 43 Iowa 662.

$12,500 Man 60, made invalid. *R. R. v. Bode*, 51 Ill App. 440.

$10,000 Woman earning $300 to $350 housekeeper, $500 or $600 teacher, permanently crippled, unable to work. *Collens v. City*, 35 Iowa 432.

$15,000 Physician, earning $1,200 to $1,500, almost totally disabled. *R. R. v. Pence*, 79 Ia. 389; 44 N. W. 686.

$15,000 Painter, $3 a day, unable to stand erect, deformed and incapacitated. *Schneider v. R. R.*, 59 N. Y. Super. 536.

$15,000 Laborer, 35, wholly disabled for work. *Solarz v. R. R.*, 73 Hun. 512.

$10,000 Loss of leg. *Tierney v. R. R.*, 33 Minn. 311; 23 N. W. 229.

$10,000 Loss of leg. *Porter v. R. R.*, 71 Mo. 66; 36 Am. Rep. 454.

$10,000 Loss of leg. *Taylor v. R. R.*, 16 S. W. 206.

$10,000 Loss of leg. *Hollenbeck v. R. R.*, 34 S. W. 494.

$10,750 Loss of foot. Not incapacitated from following business as bookkeeper. *Kennon v. Gilman*, 9 Mont. 108; 22 Pac. 448.

$12,000 Loss of foot. *Trinity v. Lane*, 15 S. W. 447.

$10,000 Loss of foot, minor 24. *Bowers v. R. R.*, 4 Utah 215.

$11,000 Loss of leg. *Berg v. R. R.*, 50 Wis. 419; 7 N. W. 347.

$10,000 Loss of arm. *Co. vs. Rembars*, 51 Ill. App. 543.

$12,500 Loss of arm. *Rodney v. R. R.*, 127 Mo. 676; 23 S. W. 887.

$11,000 30, permanently disabled. *Belair v. Chicago*, 43 Iowa 662.

$10,885 One hand incapacitated, much pain. *Sesselman v. Nutrop*, 76 App. Div. (N. Y.) 336.

$10,000 Right arm crushed and amputated and other injuries. *Galveston v. R. R.,* 17 Tex. Civ. App. 585.

$11,000 Right arm practically useless. *Baird v. N. Y.,* 172 N. Y. 637.

$10,000 25 years. Loss of right hand. *Union Pac. v. Young,* 19 Kan. 488.

$12,000 Girl 8 yrs., severe and serious injuries, reduced from $30,000. *Mitchell v. Ry.,* 13 Wn. 560.

$10,500 Woman 38, displaced womb and probable amputation of limb. *Smith v. Spokane,* 16 Wn. 403.

$15,000 Woman 30, earning $50 a month. *Sears v. R. R. Co.,* 6 Wash. 227.

$14,000 Loss of leg. *Melse v. Co.,* 42 Wn. 356.

$15,000 Not excessive—single woman 31—left leg cut off 5 inches below knee, and her expenses were $500. *Buggs v. Seattle Elec.,* 54 Wash. 483.

$12,000 Loss of leg to boy of 5 years. *Aperton v. Second Ave. R. R.,* 40 N. Y. S. R. 231.

$10,000 Loss of leg. *Atchison R. R. vs. Moore,* 31 Kan. 197.

$18,000 Excessive injury to brakeman with interest at legal rate amounts to $1,800. Three times as much as he would have earned. *Chicago v. Jackson,* 55 Ill. 497.

$25,000 Boy 13 lost both hands. *Olson v. Co.,* 58 Wn. 151.

$18,000 Woman, broken arm could not be set straight, fracture of skull, headache, weak eyes. *Stevens v. Long Is.,* 54 App. Div. (N. Y.) 623.

$15,000 Loss of arm. *Ill. Cent. v. O'Connor,* 90 Ill. App. 142.

$14,000 35 yrs. R. R. man, loss of arm, earning $115 a month. *Galveston v. R. R. Texas,* 47 S. W. 1050.

$12,000 Street car conductor, compound fracture, stiffening of one arm, usefulness impaired, 9/10. *N. Chicago v. Dudgeon,* 83 Ill. App. 528.

$11,000 Brakeman, 34 yrs., earning $90 a month, usefulness of arm and hand destroyed. *Galveston v. Courtuez,* 30 Tex. Civ. App. 544.

$11,000 Fireman, $80 a month salary. Right arm useless. *Baird v. N. Y. Cent.,* 172 N. Y. 637.

$18,000 Leg and permanent injury to other foot. *Galveston v. Haynes,* 21 Tex. Civ. App. 34.

$15,000 Foot and ankle broken. *Galveston v. Cooper,* 2 Tex. Civ. App. 42.

$12,500 Cab driver, $12 a week, fracture of jaw and fracture of both legs. Though considered large not disturbed. *McDonnell v. Henry,* 44 N. Y. Supp. 652.

$12,500 Loss of arm, switchman. Was sustained. *Rodney v. St. Louis,* 127 Mo. 676.

$25,000 Reduced to $10,000. Oiler, right arm between hand and elbow. *O'Connell v. Am. Sug. Ref. Co.,* 41 App. Div. 307; 58 N. Y. Supp. 640.

MINOR INJURIES.

$8,000 Down.

$8,000 Loss of left arm and hearing of left ear. *Anglo-Am. Packing Co. v. Baier,* 31 Ill. App. 653.

$7,500 Arm amputated near shoulder. *Gibson v. Glyozor,* 76 Ill. App. 400.

$2,750 Two fingers and part thumb. Earnings decreased 50 cents a day. *Easterly v. Co.,* 60 Wash. 647.

$5,000 Two fingers. Reduced $2,500. *Barclay v. Puget Sound Lumber Co.,* 48 Wash. 241.

$1,500 Reduced to $1,000, loss little finger, hospital 2 hours. *Olson v. Tacoma Smelter Co.,* 50 Wn. 128.

$3,500 Reduced to $2,000. Slight abrasion of knee, healing at once and causing no subsequent trouble. *Billings v. Snohomish,* 51 Wash. 135.

$2,080 Not excessive, loss of tips of four fingers of left hand, 28 years old. *Durkey v. Green Lake Shingle,* 51 Wash. 145.

$7,500 Not excessive, 28 yrs. old. Stevedore, knee cap and elbow joint fractured—bones removed and lost use of arm. *Pearson v. Alaska Pac. S. S. Co.,* 51 Wash. 560.

$3,708 Reduced to $3,008. Carpenter, 28 yrs. Little finger of left hand, middle finger above knuckle joint and end of index finger, leaving sensitive to touch and cold. *Rova v. Seattle Elec.,* 55 Wash. 217.

$6,375 Reduced to $4,000. Oiler, 50 yrs. old. Injury to ankle obstructing movement somewhat. Required him to walk with cane. Hospital 2 weeks. *Smith v. Hewitt Lumber Co.*, 55 Wash. 357.

$5,000 O. K. fracture of leg and arm. *Hosett v. Preston Mill Co.*, 55 Wash. 416.

$3,000 O. K. Broken ankle. 35 yrs. old. Part ankle bone removed and some evidence to show permanence. *Kean v. Seattle*, 55 Wash. 622.

$5,000 Reduced to $3,000. Broken nose and foot injured. *Jewell v. Trans. Co.*, 55 Wash. 156.

$5,250 1 inch off limb. *Muller v. Wash. Water Pow.*, 56 Wash. 556.

$4,000 Jaw fractured and ear. *Wells v. Moran*, 55 Wash. 102.

$3,000 Little finger—middle finger part—end index finger. *Rudi v. Seattle*, 55 Wash. 217.

$2,500 Great toe and slight limp. *Nelson v. Brownley*, 55 Wash. 256.

$8,000 Truckman, 25 yrs., loss of use of right arm, large but not excessive, though earned as much after accident as before. *Okube v. R. R.*, 53 N. Y. Supp. 940.

$5,000 Broken leg, 67 yrs. old. *No. Chgo. vs. Wiswell*, 68 Ill. App. 443.

$2,000 Broken arm. *New Orleans v. Schneider*, 60 Fed. Rep. 210; 8 C. C. A. 571.

$4,500 Broken arm, woman 54, set O. K., reduced to $2,500. *Hays v. Seattle*, 57 Wash. 230.

$3,700 Not disturbed. Street car accident, witness testified to injury to spine where two doctors appointed by Court testified that plaintiff had no serious trouble of any kind. *Van Dyke v. Seattle Elec.* 55 Wash. 687.

HERBERT W. MEYERS,
Atty. for Pltf.

November 6, 1911.

Indorsed: Plaintiff's Supplemental Brief. Filed U. S. Circuit Court, Western District of Washington, Nov. 6, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

On application of Herbert W. Meyers, attorney for the plaintiff above named and for good cause shown, the motion for new trial having been granted,

IT IS ORDERED that the time within which the plaintiff may file its bill of exceptions in the above entitled cause to matters occurring at the trial and duly excepted to, be extended by the Court from November 16th, 1911, to the 1st day of December, 1911, in which to file and serve his bill of exceptions.

Done in open Court this 11th day of November, 1911.

C. H. HANFORD, Judge.

Indorsed: Order Extending Time to File Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Nov. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This cause coming on to be heard on the application of Herbert W. Meyers, attorney for plaintiff, for an extension of time within which to file in this Court plaintiff's proposed bill of exceptions, and it being made to appear to the Court that it is impossible for the plaintiff to file the same before December 5, 1911.

It is now by the Court ordered that the time for filing the bill of exceptions herein be extended and plaintiff is hereby granted until December 5, 1911, within which to prepare, serve and file his proposed bill of exceptions.

Done in open Court this 29th day of November, A. D. 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 29, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This matter coming on for hearing this 29th day of November, 1911, and the Court being satisfied that this is a case in

which permission to file an amended complaint should be granted;

IT IS NOW BY THE COURT ORDERED that the plaintiff may file an amended complaint in this cause, making further and more detailed allegations as to safe place in said complaint.

DONE IN OPEN COURT this 29th day of November, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 29, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.

No. 1934.

Praecipe.

To the Clerk of the above Entitled Court:

You will please have subpoena made out for December 19, 1911. Sam Marcovich, Wm. Savage, Mele Melovich and John Doe (?).

HERBERT W. MEYERS.

Indorsed: Praecipe for Process, etc. Filed U. S. Circuit Court, Western District of Washington, Dec. 12, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

SECOND AMENDED COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one, M. J. Whitson as its resident and statutory agent, and as such may sue and be sued in the Courts of the State of Washington.

II.

That the defendant on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small building, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

That the buildings were all of a permanent nature and a

part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and with which cogs and gears the employes of the defendant were liable to come in contact, while in the performance of their duty as such employes, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employes therefrom, and without interfering with the efficiency of said machinery by so guarding.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide a safe place in which for plaintiff to work and reasonable guards for the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's direction as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have

and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three-inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely, on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant corporation. That the carelessness and negligence aforesaid consisted in failing to provide a safe place for plaintiff to work in and to provide and maintain reasonable safe guards for the aforesaid cogs, shafts and gearing.

VII.

That within six months after plaintiff received said injuries, to-wit, on the 19th day of October, 1910, and again on the 2nd day of November, plaintiff gave a notice in writing of the time, place and cause of his said injuries to the defendant corporation through M. J. Whitson, its resident and statutory agent, which notice was signed by Herbert W. Meyers, attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year had not elapsed since the happening of said injuries at the time the original complaint was filed.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day and by reason of this accident he had lost in wages approximately Two Hundred Sixty-two Dollars ($262.00) up to the time of filing his original complaint.

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000).

WHEREFORE, plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred Sixty-two Dollars ($12,262.00), together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington, County of King—ss.

ELI MELOVICH, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

His
ELI X MELOVICH
Mark

Witness: CHARLES A. ENSLOW.

Subscribed and sworn to before me this 11th day of December, 1911.

(SEAL) HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of within second amended complaint received and due service of same acknowledged this 11th day of December, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Second Amended Complaint. Filed U. S. Circuit Court, Western District of Washington, Dec. 12, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 1934.

ORDER APPOINTING INTERPRETERS.

Now on this day upon motion of counsel for plaintiff and for sufficient cause appearing, it is ordered that Mr. Eli Melo-

vich and Mr. Pete David, be and they are hereby appointed and duly sworn to act as interpreters during the trial of this cause.

December 21, 1911.

Page 474 Journal 1, Circuit Court.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant and Plaintiff in Error.
No. 1934.

ORDER TO TRANSMIT EXHIBITS.

Now on the 1st day of July, 1912, upon motion of Messrs. Kerr & McCord, Attorneys for Defendant and Plaintiff in Error, and it appearing to the Court that it is impracticable to transcribe Plaintiff's exhibits A, B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12 and B-13, and Defendant's exhibits 1, 2 and 3, filed in this Court, it is ordered that said exhibits may be by the Clerk of this Court transmitted to the Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of record on appeal in this cause.

FRANK H. RUDKIN, Judge.

In the Circuit Court of the United States for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Verdict.

We, the jury in the above entitled cause, find for the plaintiff and assess his damages at four thousand two hundred and sixty-two ($4,262.00) dollars.

SAMUEL DUNLAP, Foreman.

Indorsed: Verdict. Filed U. S. Circuit Court, Western District of Washington, Dec. 22, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

MOTION FOR NEW TRIAL.

Comes now the defendant, Stone & Webster Engineering Corporation, and petitions and moves the Court to set aside the verdict returned by the jury in the above entitled cause on the 22d day of December, 1911, and to set aside the judgment

entered thereon, and to order a new trial in said cause, upon the following grounds and for the following reasons:

I.

Insufficiency of the evidence to justify the verdict and the judgment.

II.

Errors in law occurring at the trial and duly excepted to at the time by the defendant.

III.

For the reason that the Court should have granted the motion of the defendant for a directed verdict, made at the conclusion of the testimony, the evidence clearly showing that the plaintiff assumed the risk by continuing in his employment with full knowledge and appreciation of the dangers incident thereto. The evidence showing that the plaintiff was a man of average capacity and that the danger resulting in his injury was open, obvious and apparent and was known, understood and appreciated by him, and for the reason that the plaintiff was guilty under the evidence of contributory negligence in allowing his clothing to come in contact with an obvious and open danger.

IV.

That the evidence is insufficient to support or justify the verdict and a judgment against the defendant in that it clearly showed that the plaintiff assumed the risk of all open and obvious dangers.

V.

For the reason that the Court committed error in refusing to give the several instructions numbered from one to eighteen inclusive, requested by the defendant, and for error in refusing to give each of said instructions.

VI.

For the reason that the Court erred in giving certain instructions to the jury which were duly excepted to by the defendant at the trial, and in accordance with the rules of this Court.

This petition for a new trial will be based upon the pleadings, papers on file, minutes of the Court, notes and memoranda kept by the Judge, and upon the transcript of the testimony taken by the reporter who reported the case.

KERR & McCORD,
Attorneys for Defendant.

Copy of within petition received and due service of same acknowledged this 30th day of December, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Petition for New Trial. Filed U. S. Circuit Court, Western District of Washington, Dec. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendants.
No. 1934.

To the Stone & Webster Engineering Corporation and to Kerr & McCord, their attorneys:

You and each of you will please take notice that the plaintiff, by his attorney, Herbert W. Meyers, will, on Tuesday morning, January 2nd, 1911, at 10 a. m., ask the Clerk of the United States Circuit Court to tax his costs in the above entitled cause in accordance with the cost bill attached hereto.

HERBERT W. MEYERS,
Attorney for Plaintiff.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MEMORANDUM OF COSTS AND DISBURSEMENTS.

Disbursements.

Clerk's fees, to be taxed	$
Service fees	
Serving subpoena on Mele Melovich, Darrington, Wash.	
Serving subpoena on Wm. Savage, Seattle, Wash.	2.12
Serving subpoena on M. C. Lord, Seattle, Wash.	2.12
Attorneys fees	20.00
Reporter's fees (if not paid by defendant)	25.00
Witness fees:	
Mele Melovich, 2 days	6.00
Mele Melovich, mileage, 54 mi., Darrington to Seattle	5.40
Wm. Savage, 3 days	9.00
Sam Marcovich, 2 days	6.00
Sam Marcovich, mileage, 54 miles, Darrington to Seattle	5.40
Mrs. Eli Bielich, interpreter, 3 days	9.00
O. D. Edmundson, 3 days	9.00
M. C. Lord, 2 days	6.00

United States of America,
Western District of Washington.—ss.

Herbert W. Meyers, being duly sworn, deposes and says; that he is the attorney for the plaintiff in the above entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct

to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 23d day of December, 1911.

(SEAL) JAMES E. McGREW,
Notary Public in and for the State of Washington, residing at Seattle.

Recd. copy this 23d day of December, 1911.

KERR & McCORD.

Indorsed: Memorandum of Costs and Disbursements. Filed in the United States District Court, Western District of Washington, Jan. 11, 1912. A. W. Engle, Clerk. By S. Deputy.

In the Superior Court of the State of Washington in and for the County of King.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

IT IS ORDERED, That the defendant be and it is hereby given thirty days from this date within which to prepare, file and serve its proposed bill of exceptions.

C. H. HANFORD, Judge.

January 26, 1912.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Jan. 26, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

This matter coming on for hearing this —— day of February, 1912, on the motion of the defendant for a new trial, and the plaintiff being represented by his attorney, Herbert W. Meyers, and the defendant by its attorneys, Kerr & McCord;

It is ordered, adjudged and decreed that the motion for new trial be denied and that judgment be entered accordingly, and defendant excepts and exception allowed.

Done in open Court this 14th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Feb. 15, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Judgment.

BE IT REMEMBERED that this cause came duly on for trial on the 20th day of December, 1911, and the same was con-

tinued until December 21st, and said trial proceeded until and including the 22nd day of December, 1911.

Plaintiff appeared in person and by Herbert W. Meyers, his attorney, and defendant appeared by Kerr & McCord, its attorney, thereupon a jury of twelve good and lawful men of the district was empanneled and sworn, and the plaintiff introduced his testimony and rested, and defendant introduced its testimony and rested; the cause was argued to the jury by counsel upon either side and the jury was charged upon the law of the case by the Court, and thereupon retired in charge of a sworn bailiff, to consider its verdict, and said jury, after duly considering the same, did on the 22nd day of December, 1911, return its verdict wherein and whereby it did find in favor of plaintiff and against the defendant, and assessed the plaintiff's damage in the sum of $4,262.00.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from defendant, judgment in the sum of $4,262.00 and for his costs and disbursements hereinafter to be taxed, for all of which let execution issue.

DONE IN OPEN COURT this 15th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Judgment: Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Stipulation.

IT IS STIPULATED by and between Herbert W. Meyers, attorney for the plaintiff, and Kerr & McCord, attorneys for

the defendant, that the time for filing and serving a bill of exceptions in the above-entitled cause may be extended ten days and until the 25th day of March, 1912.

Seattle, Wn., March 14th, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 14, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

On the stipulation of the parties to this action it is by the Court

ORDERED that the defendant is hereby granted until the 25th day of March, 1912, to file and serve its bill of exceptions upon the plaintiff in the above-entitled cause.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 14, 1912. A. W. Engle, Clerk. By S., Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PLAINTIFF'S PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the plaintiff and proposes the following amendments to the proposed bill of exceptions in this cause, to-wit:

I.

In line 27, on page 1, add, after words, common law, "Mr. Kerr, in the other trial, made the objection and had us elect between the Factory Act and the common law."

II.

In line 16, on page 2, insert after the word "machine," "that he was not given any instruction about the gravel machine when he went to work on the motor."

III.

In line 18, on page 2, insert after the word "machine,"

Q Was the machinery protected or guarded in any way?

Mr. McCord: "I object to that as irrelevant, immaterial, incompetent, and they are not suing under the Factory Act and there is no requirement here that the machine should be guarded, if it was reasonable safe without it, and it is not a proper question it is irrelevant, immaterial and incompetent to show whether or not the machine was guarded.

THE COURT: Are you contesting this point? Do you claim that it was guarded?

MR. McCORD: No, sir; I do not claim it was guarded, but

I do not think they have any right to show whether or not it was guarded.

THE COURT: If you object to the question on the ground that it is leading I will have to sustain it.

MR. McCORD: I object to it on the ground that it is leading, irrelevant, immaterial and incompetent and not within the issues.

THE COURT: I will sustain the objection. * * *

MR. MEYERS: May it please your honor, with an ignorant witness of this sort would your honor suggest how I could get that fact out?

THE COURT: Ask him to describe that machine.

MR. MEYERS: The motor below?

THE COURT: Yes. Now, I have played the school master here quite enough.

MR. MEYERS: With an ignorant witness of this sort it is pretty hard at times not to lead him some.

IV.

In line 21, on page 2, after the word "little" insert the word "machine."

V.

Insert between lines 29 and 30, on page 2:

MR. McCORD: I ask that that portion of the evidence that refers to what Mr. Savage did be stricken.

MR. MEYERS: We consent that that part be stricken, but the portion that says it was covered should remain.

THE COURT: No, I will not strike that out, it may stay.

MR. McCORD: Which machine is this?

MR. MEYERS: This is the motor below, where he was working.

VI.

In line 30, on page 26, strike the words, "how long," after the first question mark, and insert in lieu thereof "What sort of."

VII.

In line 32, on page 28, before the word "work," insert the word "his."

VIII.

Strike lines 9, 10 and 11, on page 40, and insert in lieu thereof:

MR. McCORD: I object to that as irrelevant, immaterial and incompetent under the admission.

MR. MEYERS: Mr. McCord is making the objection that Mr. Kerr made, and your honor ruled with us on that point. I will read it to your honor from the record. It says here: "Q Mr. Savage, do you know whether the cog-wheels and machinery around the motor were guarded or not?" And then it says: "Mr. Kerr: I object to that as irrelevant, immaterial and incompetent. (The objection is overruled and an exception noted for defendant)."

MR. McCORD: Notwithstanding your honor's ruling at that time, I think it wholly immaterial what this other machine was and how it was constructed and what method was used in its construction. The question is whether this machine was the cause of this injury or whether this was not a safe place. That is the only ground of negligence, as I understand it. It does not make any difference as to the other machine.

MR. MEYERS: In this case one of the allegations is to the effect that the company knew that this man was ignorant. Now if we show by a man who was foreman for the Stone & Webster Company at that time that he knew he was so ignorant that he had to take some action, which we will bring out, it seems to me that it is the most salient feature in the case. He was the foreman at the time, which I will bring out in a moment, and the man came there and reported to him and he was looking after the motor at the time as foreman.

THE COURT: I suppose I overruled that objection on the other trial on the theory that that admission was not in the record, but I will overrule the objection now. (Exception noted for defendant.)

Q Do you know whether the cogwheels of the machinery around the motor were guarded—the motor below?"

IX.

In line 5, on page 45, insert after the word "kinds" the following, "and had designed a number of machines similar to the one in controversy."

X.

Insert between lines 17 and 18, on page 46:

Q Prior to the time of the passage of the Factory Act a great deal of the cog-wheels and shafting was left unguarded, wasn't it, in the majority of cases, around saw mills, and it was not guarded as a rule where it was open and where a man could see it—it was not customary prior to the passage of that act, to guard machinery, even in saw mills and manufacturing plants was it?

A Yes, I must say it was; most constructing engineers generally regard it as necessary.

Q But I say—

A (Continuing)—and planned accordingly.

Q I say, it was the general rule to guard it prior to that time, was it?

A I believe, according to my experience it was, yes.

XI.

Insert between lines 27 and 28, on page 46:

Q In a plant of this kind a man would have very little occasion to go up there, except to oil the machinery.

A Well, he would have to go up there for a good many purposes; he would have to go up there to oil the machinery and probably there would be more or less belt troubles that he would have to attend to.

Q He would not come in contact or come near this cog wheel except in oiling the machinery, would he, as a rule?

A Yes, as a rule.

Q Sir?

A That is the rule, yes sir.

Q You heard Mr. Savage say it was about four feet between the bearings, didn't you?

A I don't believe I paid any attention to his testimony.

Q Assuming that he said that, and the cog-wheel was

right in the center, and that would leave two feet to either side for oiling purposes, now there would be no occasion for a man to go above there—

A—(interrupting) You say the shaft is four feet long?

Q Yes.

A Well, of course the shaft would take up a good deal of the space and would not leave much space for a man to get around.

XII.

In line 2, on page 47, add "Of course it depends a good deal on conditions. I did not pay particular attention to that lifting apparatus there. They might have some trouble, due to the apparatus clogging at the point of discharge. It might be possible that a man would have to go up there to clear that sometimes."

XIII.

In line 32, on page 47, insert after the word objection, the following, "by stating that he thought that it was a photograph of the machine out there as it was at the time of the accident, and that it was a photograph of either one or the other of two machines out there." Also, in the same line, on the same page, after the word "that," the words, "as far as he knew."

XIV.

In line 20, on page 48, after "A" (answer) insert, "as I remember this particular platform."

XV.

Insert between lines 5 and 6, on page 50, the following: "Q I will ask you Mr. Sears if you had any familiarity with other gravel plants similar to this one in operation in this state? A Not exactly similar. No; this was an unusual place and required unusual methods of handling gravel."

XVI.

In line 32, on page 50, strike the words, "sir, no."

XVII.

Insert between lines 12 and 13, on page 51, the following:

"Q Do you know where any of the other employes of the company that were present at the time of this accident are now? A I was not at the accident, so I do not know who was there."

XVIII.

Insert between lines 31 and 32, on page 51, the following: "Q (Mr. Meyers) Did you, on the occasion of the former trial, Mr. Sears, make a statement in answer to a question of this sort: 'Q So that in oiling the bearing fartherest away from you what would be the distance he would be required to reach with his oil? A About eighteen or twenty inches.'—I think you just made the statement that it was fourteen and one half—I just wanted to know whether or not you made that statement? A Well, those distances I am giving you are from memory and approximately. I might vary three or four or five inches, and maybe six inches in giving my testimony. Q And did you, on the occasion of the former trial, in response to this question: 'Q How close to it Mr. Sears —close enough so that he could see it? A Oh, yes, probably fifty or sixty feet.' That is, the place where the men would pass in proximity to the gravel machine you just now said ten or fifteen feet—did you make that answer? A Well, I would like to know the question. Q (Reading) 'Q How close to it Mr. Sears—close enough so that he could see it? A Oh, yes probably fifty or sixty feet.'

XIX.

In line 26, on page 52, insert after the word English the words, "very brokenly."

XX.

In line 5, on page 53, after the word elevators, add, "that he does not put those machines up but just sells them."

XXI.

In line 10, on page 53, strike the words, "and that was all the evidence in the cause," and insert in lieu thereof: Dr. Bruce Elmore, a witness on behalf of defendant, testified, that he had been a surgeon for about ten years, was a graduate of

Columbia University that he was the first medical attendant upon plaintiff after the accident. "Q What did you do with him after you found him? A I knew the nature of the injury, that is it had been telephoned down so I at once, with my assistants prepared him and examined the arm and found that it was almost completely severed, there was practically nothing left but a little skin that held the arm to the shoulder, so I did a complete amputation a few inches below the joint. Q How far below the shoulder joint? A I think it is about two inches of bone that is left, I can only state from memory. The witness testified further, that there were a number of abrasions, not many and not severe on the face, head and breast, that he had complete charge of plaintiff from that time on, that he was present at the meeting between Mr. Sears, Mr. Roberts, and plaintiff, in the White Building, that he engaged in the conversation. Upon cross-examination the witness testified as follows: Q (Mr. Meyers) Doctor, in the former trial you were asked this question, (reading): 'Q From your experience as a physician and surgeon and having performed that operation and treated the plaintiff until August, what would you say as to whether there would be any ill results following from the loss of that arm, other than the loss of the arm itself, any constitutional injuries resulting from it. A. In very few cases would there be any.' Now, were you asked that question and did you give that answer? A I presume so. Q. And were you asked this question (reading): 'Q Doctor, you would not say that Eli Melovich, here had not suffered any pains in his chest or had any ill effects so far as that wound is concerned, in coming in contact with the cogs, would you? A I don't understand the question—he had pain certainly,' and you were asked this question (reading): 'Q Dr. I show you a scar here—is that approximately where the cut or abrasion you mentioned was? A Why, I think so—I know it was on the face'—did you make that statement? A I presume I did. Q And did you give this testimony (reading)? 'Q There was considerable blood flowing from that wound, was there not? A Oh, yes'—did you make that answer? A I remember saying there was blood all over. Q 'Considerable blood flowing from his arm and also his face.

A Why, he was covered with blood'—did you make that answer? A Yes.

And now in due time, the plaintiff submits the foregoing as his proposed amendments to the defendant's proposed bill of exceptions herein, and prays that the same may be allowed.

Dated this 1st day of April, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

The foregoing proposed amendments are allowed, except those disallowed as indicated.

C. H. HANFORD, Judge.

May 3, 1912.

Copy of within proposed amendments to proposed bill of exceptions received and due service of same acknowledged this 1st day of April, A. D. 1912.

KERR & McCORD,
Attorneys for Plaintiff.

Indorsed: Proposed Amendments to Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 2, 1912. A. W. Engle, Clerk. By S.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Stipulation.

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto by their respective counsel undersigned, that the Bill of Exceptions in the above entitled matter may be taken up and settled on this the 2nd day of May,

1912, the giving of notice for the settlement of the same being hereby expressly waived.

HERBERT W. MEYERS,
Attorney for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Certificate.

This matter coming on this 2nd day of May, 1912, and the Court having read the plaintiff's proposed amendments to defendant's proposed bill of exception and having stricken out on the original the portions which the Court deemed not proper as a part of the proposed bill of exceptions, the Court certifies that the remaining portions of the plaintiff's proposed amendments are and should by right be a part of the bill of exceptions and the Court certifies them as such, the same to be made a part of defendant's proposed bill of exceptions, and to be certified to the Appellate Court as a part of said proposed bill of exceptions. The Court has stricken and disallows the portions stricken out by him and allows plaintiff an exception to said ruling.

C. H. HANFORD, Judge.

Indorsed: Certificate. Filed in the U. S. District Court, Western Dist. of Washington, May 3, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER SETTLING BILL OF EXCEPTIONS.

This cause having been brought on regularly before the Court on this the 3d day of May, 1912, upon the application of the parties hereto for the settling and certifying of the Bill of Exceptions lately filed herein, and the time for the filing, settling and certifying of said Bill of Exceptions having been duly extended by orders of the Court and by the stipulations of the parties until and including this day and the parties having agreed together to submit to the Court the proposed Bill of Exceptions and proposed Amendments to said proposed Bill of Exceptions and all of said amendments so far as are proper having been embodied in said proposed Bill of Exceptions as originally filed by amendment thereof.

THEREFORE, on motion of Messrs. Kerr & McCord, the defendant's attorneys, it is ordered that said proposed Bill of Exceptions heretofore filed by the defendant in this cause as the same now stands amended as aforesaid, be and it is hereby settled as the true Bill of Exceptions in this cause and the same as so settled be now and here certified accordingly by the undersigned Judge of this Court who presided at the trial of this cause and that said Bill of Exceptions when so certified be filed by the Clerk.

Done in open Court this the 3d day of May, 1912.

C. H. HANFORD, Judge.

Indorsed: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 3, 1912. A. W. Engle, Clerk. By S., Deputy.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 20th day of December, 1911, the above entitled cause came on for trial before the above named Court and a jury duly empaneled, the Honorable C. H. Hanford, Judge presiding, the plaintiff appearing by his attorney, Herbert W. Meyers, Esq., and the defendant appearing by Messrs. Kerr & McCord, and the following proceedings were had:

Mr. Meyers made a statement to the jury on behalf of the plaintiff.

MR. McCORD: Mr. Meyers, are you proceeding at common law or under the Factory Act?

MR. MEYERS: Common law.

MR. McCORD: I simply wanted to know whether you sue under the common law.

MR. MEYERS: Yes.

ELI MELOVICH, the plaintiff, thereupon testified in his own behalf as follows:

That he resided on July 12th, 1910, at Seattle, Washington, and on that date was working for the defendant at Snoqualmie; that he had been working with pick and shovel, but that his regular work at the time he lost his arm was running a motor down on the ground; that he had done no kind of work on machines and had not seen a gravel machine, except the one referred to in the complaint, and that he did not know anything about the parts of any machinery or about concrete

mixing machinery. That he had never taken any machines apart; that he had been working on the motor about three weeks before he was hurt; that he had been up on the gravel machine referred to in the complaint two or three times before he was hurt. That the motorman instructed him a little about the break—the motorman on the motor machine; that he was not given any instruction about the gravel machine when he went to work on the motor; that he was sent up on the gravel machine by the boss to grease the machine.

Q What was the condition of the motor below that you were working on, when you were working on it?

A There was a little house covering for it below and it was just like running this break on a street car.

Q Could you see the wheels of that machine when you were working around it?

A Well, to answer that question, he says the time he went to work there Mr. Savage came there and covered that wheel—a man named Savage.

Q It was covered?

A Covered on the day I went to work there.

Q Tell the jury, as nearly as you can remember, about the platform on the gravel machine and about the machinery on the top of that platform.

A It was about three feet wide, he should judge, and about five feet long and on that stood the machinery and wheels and belt and a little motor—he can't tell unless he has something to describe it on, he says.

Q What is that, if you know? (showing photograph to witness).

A This is the machine that cut off his arm.

Q Were you present when that picture was taken?

A Yes.

Q About when was that taken?

A A short time after the accident—after he came out of the hospital.

(The witness identified another picture of the machine.)

Q Tell the jury in your own language about the machinery up there and the platform handing Exhibit "A" to the witness).

A Right in there is the platform, at the letter "C." Right in that dark shed, he was right inside, he says.

Q The dark shed marked "B" is where he was at the time. Now show the jury how you got up there.

A There is steps going up there and he climbed up that ladder—well, half the way up he could climb up, and the other half of the way he said he would have to lean away back in order to get in.

Q Show the jury how you had to lean in going up, in reaching the platform; what do you mean?

A Well, he just says that he went up half ways that he could go up straight and then he would have to lean back, he said, to get on that.

Q When you went in the platform, just before oiling, did you approach the platform forward or backwards?

A It is not built so he could go in straight up the ladder —he would have to turn his body back in order to get in there.

Q Show the jury how you oiled the wheels, if you did oil them—show the jury, tell them about that—show the jury just how you oiled the wheels and the cogs—show them here.

A The belt came right up to my back.

Q Which belt?

A This belt right there (showing).

Q The belt marked "D." Now when you got your arm cut off where were you standing?

A Right in the center and that belt was right at the back of his neck; right up his back, and this track wheel where the buckets are, he had to reach over to oil this bucket and this cog-wheel on the outside—he had to reach over there.

Q Why did you reach over?

A There was boards nailed so that it did not allow you go any farther. The platform was small.

Q Can you point to where the boards were that you say kept you from getting any farther over, when you were oiling that wheel?

A That far. He said he could not go any farther than that.

Q Plaintiff points to "E," which he says is the platform which prevented him from going any farther towards the—

MR. McCORD: He didn't say "platform."

MR. MEYERS: He said boards which prevented him from going any closer to the buckets.

Q When the wheel was going around, could you see the cogs?

A It goes fast like the wind is blowing and you could not see it.

Q At the time you had your arm taken off was that cog wheel in any way guarded?

(Objected to and objection sustained.)

Q What was the condition of that cog-wheel at the time you had your arm cut off, Eli?

A He says there was no covering on it at all; no guard on the wheel. He could see it after his arm was taken off.

MR. McCORD: I move to strike that out as irrelevant, immaterial, incompetent and not within the issues.

(Motion denied. Exception noted for defendant.)

Q Tell the jury what kind of an oil can you used?

A Well, he said it was about one foot long and half of it was the oil can and half of it was the spout.

Q Who gave you that can?

A The bookkeeper.

Q When you were oiling the wheels you were looking toward the enclosure or out towards space—toward the wheels?

A He stooped over with his arm to put the oil on the wheel and he was watching to see where he was putting the oil.

Q Were you just as close to the wheels as it was possible for you to get at the time you were oiling them?

(Objected to and objection sustained.)

Q Have you seen that gravel machine since you had your arm taken off, and if so, how many times?

A Yes, sir; four or five times since he had his arm taken off.

Q Was there anything to the right of the boards which you spoke of and which you marked with the letter "E," to have prevented the extending of that platform?

(Objected to and objection sustained.)

MR. MEYERS: I simply want to draw out the fact that he has seen the machine a good many times since then, and

whether or not there was anything to prevent that platform from going out farther.

THE COURT: You have no right to assist him with such leading questions as that. And you are assuming a burden there that you do not have to assume of proving a negative.

MR. MEYERS: The unsafety of the place was the only idea.

THE COURT: Well, if they offer any evidence here to prove that it was impossible to construct that machine differently, you will be allowed, perhaps, to rebut it.

Q With reference to this picture (plaintiff's Exhibit "A") where was the motor on which you were working at the time or just prior to the time when you lost your arm?

A The gravel machine was about fifteen feet above the motor machine, right by the track.

Q Where would that track run on this picture—Exhibit "A"—it is not on there but where would it run with reference to this picture?

A The track ran from the power house and the motor was down on the ground, about from here to where the last seat of the jury would be—the gravel machine would be there from the track, and that was the lower part of the motor machine (showing)—that is where they loaded the cars and that is where the motor ran.

Q Was the machinery running when you were oiling it?

A Yes, sir; if it didn't run it would not take his arm off.

Q Were you ever told anything about stopping the machinery the cogs?

(Objected to and objection sustained.)

MR. MEYERS: It might be all right for them to have oiled it when they were not running, but when they were running the question was, were we told anything about stopping the machinery to oil it?

THE COURT: It is objected to on the ground that it is immaterial. Now it is immaterial under this pleading what he was told and what he was not told, except that he was told to do that work—you can prove that. I will sustain the objection.

Q When you were up there oiling the wheels, Eli, where was your boss?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent, and for the further reason that he has already answered where he was, and it is immaterial where he was.

(Objection sustained.)

Q Could your boss have stopped the machinery that controlled those wheels when you went up?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

(Objection sustained.)

Q How long did it take you to oil those wheels?

A Two or three minutes.

Q Was your car motor running or idle when you oiled the cogs?

MR. McCORD: I object to that as immaterial.

(Objection sustained.)

MR. MEYERS: The fact whether the work he was engaged on was being neglected when he went up would have a bearing on the conditions up there and as to his coming back and his duties.

THE COURT: Why, I suppose there are a thousand things that might have had a bearing on it, but we cannot spend the time to chase around after everything that might have had a bearing—it is not alleged in your complaint that it did have a bearing.

MR. MEYERS: Only in a general way.

THE COURT: It is not material and it is not important enough to spend time on.

MR. MEYERS: If we had put all the allegations in they would have made a motion to strike—we merely made the general allegation.

THE COURT: They are not necessary to make out the case.

Q Point out on the picture, Eli, and show the jury where it was that your arm got caught, if it did get caught?

A He was standing at the letter "B," and that belt was right at the back; that little wheel was the one—the letter "D" —he was putting oil in this place (showing).

Q In the box near the wheel marked "F"—now where was your arm caught?

A He sees the big wheel; he says he can't see the little one—it is in there some place (pointing).

Q Point out about where that place was.

A There (pointing).

Q Right here where I am putting the letter "M" is the place that the witness says.

MR. McCORD: I suggest that you let him testify. You can mark the letter if you wish, but let the witness do the testifying.

MR. MEYERS: The witness pointed to where I put the letter "M."

MR. McCORD: I suggest that the stenographer can see where the witness is pointing as well as you can.

MR. MEYERS: The stenographer has his hands full; he has a hard job of it.

MR. McCORD: Well, they are sworn and you are not.

MR. MEYERS: The plaintiff points to the letter "M" as the place where—

MR. McCORD: I object to that; let the witness point himself and not have the counsel testify.

MR. MEYERS: He has done so.

MR. McCORD: Let him do it.

MR. MEYERS: Is there any objection to the jurors taking some of these pictures and examining them?

THE COURT: Have they been offered in evidence?

MR. MEYERS: Yes, they have been offered in evidence.

THE COURT: The jury may use them.

Q Point out on plaintiff's Exhibit "B-1," on this picture (showing) where it was that your arm was caught.

THE INTERPRETER: Now he is pointing right there (pointing).

MR. MEYERS: The plaintiff points to the letter "B" on plaintiff's Exhibit "B-1" as the place where his arm was caught.

Q Can you see on this picture the small cog that ran into the large one that cut your arm?

A It was covered afterwards so that he is not able to see it.

MR. McCORD: I move to strike out the answer as an indirect way of attempting to put in something that is immaterial and prejudicial.

MR. MEYERS: I grant that it may be stricken.

THE COURT: Strike it out.

Q Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about it.

MR. McCORD: I object to that as immaterial, incompetent, irrelevant and leading.

MR. MEYERS: It goes to the safety of the place.

THE COURT: I will overrule the objection.

(Exception noted for defendant.)

THE INTERPRETER: I will have to ask him that question again, because he goes on to describe the whole machinery—I will have to tell him to answer one question at the time.

MR. McCORD: All right.

Q Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about in?

A There was no room to turn around in; he has to stand in one spot to oil, the platform was so small.

MR. McCord: I move to strike that out as a conclusion of the witness; he says he went on the platform and he was asked how much space there was to turn around, and he gave the size of the platform, and it was for the jury to determine whether there was room to turn around there or not and I move to strike it out as stating a conclusion.

THE COURT: The motion to strike is denied. An exception is allowed to the defendant.

A About one foot from the belt to the track wheel.

Q How's that?

A About one foot, I should judge, from the belt to the track wheel.

Q Ask him about the top of the platform, I mean, and not the ground.

A At the top of the platform.

Q Where the different pieces of machinery were?

A Yes, where the gravel machine was, between the wheels

about one foot, and about another foot between that wheel and the other wheel, and the other wheel there was a box to be oiled about half a foot from the wheel and he had to reach over there and that is why his arm was taken off.

MR. McCORD: I move to strike out the latter part of the answer as to why his arm was taken off as irrelevant, immaterial and incompetent and it is for the jury.

(Motion denied. Exception noted for defendant.)

Q. Show the jury just how your arm was caught and just where it was caught.

A He went up on top and as he reached over in to put the oil in the bucket it caught his arm.

Q Where did the cog catch your arm?

A Right here (showing) in the back there—the seam in the back of the arm. The track was right in front of him and it caught him there.

Q Show us again?

(Witness does so.)

Q How far from your shoulder was the place where the cog caught your arm?

A It caught him right there in the back there and tore it right off.

MR. MEYERS: Plaintiff points to a place about three or four inches from his shoulder as the place where the cog caught his arm.

Q How did you get your arm out of the wheel?

A The boss, Slim, helped to take it out and the gentleman by the name of Sam Markovich.

Q How long were you in the hospital?

A About four weeks.

Q Tell the jury all about your injuries and what pains you had as the result of the accident.

A He says they were about thirty minutes getting him out of the machine and he says there was three or four helped him down and then he went to the hospital—they took him to the hospital at North Bend and they operated on him and took his arm off.

Q Take off your coat, Eli (witness does so). How much of a stump have you got there, Eli?

A About two inches, he says.

Q Tell the jury just all about your injuries now.

A He says he could show you by unfastening his shirt, the scar; he is taking his necktie off.

Q Tell the jury now just—

A He says he was cut on the forehead and on the side of the face—torn—and this scar here—he was torn open, he said, here (showing) on this scar and away down on the right side, and all the way down it shows scars and in the back of the shoulder it shows scars.

Q How about your head; did it hurt your head in any way?

A The little track wheel cut off his arm and the big track wheel tore his face off; he says it opened it up there.

Q The after cog-wheel?

A Yes.

Q Have you scars in your head?

A Yes, he says it was all cut through there. Here, he says, it is a scar on the head right in front (pointing).

Q What pains do you have now, if any, as a result of the accident?

A It pains all the time; he says he is feeling like as if that arm remains hanging there and that side pains him all the time, he says.

Q Which side?

A The right side, he says. This side always feels that it is bound tight and numb, dull feeling.

Q Do you have any pains in your right side, aside from the arm?

A Do you mean the left side?

Q The right side.

A He says sure that it pains him.

Q Did the accident in any way affect your eating?

A He says sure that it does, he can't cut his meat.

Q I mean directly after the accident, did it in any way affect your eating?

A For seven days he didn't eat anything and for twelve days he could not sleep—he did not sleep at all on account of his legs swelling up so.

Q Did both of your legs swell up?

A Both of them—both legs were swollen up so that he could not move them without the assistance of his hand to move them.

Q Did he say anything about sleep?

A He said he could not sleep for twelve days and nights.

Q What wages were you earning when you got hurt, Eli?

A Three dollars a day.

Q Are you working now?

A He does not work any now.

Q Why not?

A He said he went around to work to several different places, but they said there was too many men without work that had two arms, he said, not men with one arm.

Q What work can you do now?

A He says he don't know whether he can do anything, as well as they didn't give it to him.

Q Can you feed yourself and cut your own meat?

A He can't, he says.

Q Can he lace his shoes?

THE COURT: I want the jury to take notice of those questions—the witness is not giving any testimony when he is asked leading questions like these.

MR. MEYERS: It will take the witness a week if I don't lead him—these questions were not objected to at the last trial. I will go ahead and ask him the other questions, but it will take three or four days and I want to get through, if possible, as soon as we can.

THE COURT: I have never seen a trial shortened by multiplying questions. If you keep on here you can think of a great number of things he can't do—you are asking him whether he can do this and do that and do the other thing—it is just a question of how long the Court will indulge you to ask this kind of questions.

Q Had you been working steadily before you were hurt, Eli?

A Yes, all the time.

Q Were you healthy before you got hurt?

A Yes, always.

Q Before you lost your arm were you right or left-handed?

A Right-handed.

Q Did you have any trouble in using your left arm?

A Yes.

Q Are you married or single?

A Married and have got two children, he said.

Q Prior to losing your arm were you kept from your work by reason of any poor health at any time or by reason of any accident?

MR. McCORD: I move to strike out the answer of the witness as to his having a wife and two children. I thing it is wholly immaterial.

MR. MEYERS: It may be stricken. We have no objection to that.

Q Did you ever see any one go up to oil the gravel machine before you did?

(Objected to and objection sustained.)

Q Did you ever see any one get hurt on the gravel machine before that?

(Objected to and objection sustained.)

Q While you were working for the Stone & Webster Company did you work every day or only some days?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

THE COURT: I will sustain the objection.

MR. MEYERS: The question of the man's making $3 a day and the amount he will lose in the future is a proper element of damage. If they worked Sundays and holidays and all the time, as is not customary in some places, I think it would be material. The jury might think, perhaps, that they were not working Sundays, but he always worked Sundays. I say this because the witness cannot understand me.

THE COURT: I will sustain the objection.

Q If you were standing over as far to the right of the gravel machine as you could get, what wheel would you be in front of?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent and leading.

(Objection sustained.)

MR. MEYERS: The only thing is that the pictures which we have been able to get are not as good as they might be and it is so dark in there that the jury would not be able to understand exactly where he would be unless they knew which wheel he was in front of.

THE COURT: He has testified as to the situation there and the circumstances. Now it does not help your side of the case to dissect and mince and pulverize this testimony by minute cross-examination. Mr. McCord will do that for you enough.

MR. MEYERS: They will do that and will leave a wrong impression.

THE COURT: Let him state a fact in its simplicity; it has weight and force and the jury can comprehend it. It only confuses it to make a prolonged cross-examination of your witness—it weakens his testimony and takes time. I think you have cross-examined him enough.

MR. MEYERS: I was trying to elicit testimony to help the Court and the jury—that is all, Your Honor.

CROSS-EXAMINATION.

MR. McCORD:

Q Take these two chairs and turn them towards each other this way and this pointer lying across the backs of the two chairs, and I will ask you to state if this pointer does not represent the shaft on which the cog-wheels that ran this machinery were fastened or attached?

A These are the steps, the posts.

Q Like these posts of the chairs?

A The timbers, but here, he said, the track wheel was there and the belt was on the end and the bucket wheel was there (showing) and the buckets were on the end—it is longer than this. He reached from here up to put the oil in the bucket.

Q I want to know how was the shafting fastened to these posts. Did they have bearings?

A By shaft—this is the shaft (pointing).

Q That is the shaft—this stick that I point out is the shaft—is that right—and the shaft fastened on the post, with one bearing on the left and one on the right, wasn't it?

A Yes, sir, one on each side.

Q Fastened with bearings, and the shaft revolved in those bearings, did it?

A And another shaft over there.

Q Now then, you had the cog-wheels right in the center of this shaft, in this open space?

A Yes.

Q How many cog-wheels were there? Two?

A Two, one big one and one little one.

Q Where was the little one located with reference to the big one?

A The small one was there and the big one went around that way (showing).

Q They were right side by side, were they—you answer that question. Were the cog-wheels side by side or where were they?

A The big one is up above the small one.

Q Both cog-wheels were on the same shaft, were they?

A No.

Q Where were they—on the same shaft?

A One over here on one shaft and one on this shaft.

Q Which one was the big cog-wheel on?

A On this side.

Q On the side farthest away from you?

A Yes, the one farthest away.

Q And the small cog-wheel was the one next to you?

A Well, they were right close together.

Q How far apart were they?

A No, there was no distance between them, because they were right together.

Q Both on the same shaft?

A No, not on the same shaft; one on the other shaft—one shaft here and the other shaft here ran the large cog-wheel.

Q You were facing it, were you?

A Yes.

Q And both the cog-wheels were right square in the center between the posts, in the center of the platform?

A He said he stood on the platform; of course it was here, he said (showing).

Q You were standing just as you are now, looking right at the center of those two cog-wheels, were you not?

A He didn't stand in front of them.

Q Well, they were both right in the center of the shaft, were they not, and right in the center of the platform?

A He says if you pull him around there he can't show you anything—he said he could not tell you just how he stood.

Q You answer my question now; that is what you are here for. I want to know whether the cog-wheels on these shafts were right in the center of the platform or not.

A No, there is no platform goes out there at all. He stood in the center of the platform—the platform was on the other side.

Q You were standing on the platform?

A Yes.

Q And the cog-wheel was right in the center of the shaft and you could stand right in front of it, could you not?

A One smaller one and one larger one turning in front of him.

Q How far was it from one post to the other?

A About four feet.

Q About four feet, was it, from one post to the other, where the bearings were attached?

A About four feet—it could not be more.

Q How far was it from the platform up to the shaft, or up to the wheels?

A About four feet.

Q About where on your body?

A About where he points to (showing).

Q The platform was four feet wide, was it?

A Well, about three feet wide, but there was no platform where the small wheel was.

Q How far towards you—you were standing on the side where you are now—what was the size of the platform on which you were standing up to this point (showing)?

A About three feet wide and about four or five feet long.

Q Now, you came up here on the day you were hurt and oiled the right bearing first, did you?

A One here and one here, he said—the shaft and that is

the first point he threw oil on (showing), and he came over here and he put some oil there (showing), and he reached over here to oil this one when it caught his arm and took his arm off.

Q You had oiled the one on the right-hand side, both bearings on both shafts?

A Yes, sir.

Q And then did you reach across from here to oil this bearing over there (showing)?

A There was no way to get past over there and he had to reach into here.

Q As I understand you, you oiled this bearing and then this one over on that side and then you came over on that side of the cog-wheels, did you?

A Yes.

Q Now, where were you standing?

A Yes, he oiled that one and then he held back his clothes, reached over and oiled this one.

Q So that you walked across the platform over to that side to oil the left bearing, nearest to you?

A He said how could he walk—he can't move around—there is no space to move around.

Q Didn't you say it was four feet across this platform?

A The shaft is four feet—he said how could there be a space—there is the motor and belts and all on that platform.

Q Where was the belt?

A On that side (showing).

Q I am asking you from the point here, from the bearing to the bearing on the left, what was the distance in between there on the platform?

A This is the track wheel—there is no platform.

Q What was it you were standing on? Isn't that a platform?

A About three feet, he said, putting all the machinery and all on that platform.

Q The machine was over in that direction, wasn't it? Where you were standing was not the platform free so that you could walk across it?

A There is no room to move around; he goes up on the

ladder and he stands right there and he has to stoop over there.

Q I want to know the distance from the platform where you were standing, from one side over to the other. How wide is it?

A About three feet.

Q And there was not anything to prevent a man from walking across there, was there?

A How could you move in there?

Q You answer my question.

A He said there is all boards nailed in there so that he could not go and walk on the platform.

Q I want to know what was on the platform to prevent your walking from one side of the platform to the other?

A The belt was there; there was only about three feet to stand and the belt on one side and as you come up the steps there was boards nailed.

Q Was there anything else but the belt which prevented your walking across from one side of the platform to the other?

A The motor and the belt and pipes.

Q Where was the motor with reference to the shaft, was it right underneath the shaft, or where?

A What motor?

Q I want to know what there was to prevent walking from one side of the platform to the other, except the belt—now what else was there?

A Nothing more than the boards nailed that he could not—

Q That was all, and then there was nothing except boards over on that side that prevented you from going along over there, was there?

A Just that the boards were nailed and the buckets came over there for the gravel.

Q How did this wheel revolve—towards you?

A Yes, sir, towards him.

Q Now, there was not any danger in oiling this bearing here after you had oiled the bearings on the right side—both of them—there was not any reason you could not oil this bearing without danger?

MR. MEYERS: May it please Your Honor, I think that Mr. McCord is going a little far when he asks a man who has proven his ignorance his reasons for doing certain things. He can ask him whether he could have gone there—he said, practically, what is the reason you could not do it safely?

THE COURT: Mr. McCord is cross-examining, and he has the right to test the ignorance or intelligence of the witness by his questions—the jury will judge whether he is ignorant or intelligent.

MR. MEYERS: (Addressing the interpreter) Tell him not to get excited, that he is all right among his friends.

MR. McCORD: I don't like that sort of a suggestion; I don't think it is proper for you to make it in the presence of the jury and the Court.

MR. MEYERS: I think any man would get nervous after awhile; I believe even you would.

MR. McCORD: I don't believe that is proper; you are impugning my cross-examination.

MR. MEYERS: Not a bit.

Q Now, I want to know when you oiled these bearings on the right-hand side, I will ask you what reason was there why you could not go across here and oil this bearing? I believe you said you did it.

A He could not go over there on that side anyway at all to oil this bearing at all. He answers this question every time that way.

Q I want to know where this shaft with the bearing here where the little cog-wheel is attached, the bearing on the left and the bearing on the right—and he looked right straight at it—I want to know whether he had any trouble with oiling that bearing?

A He doesn't know that it interfered with him any—he put the oil there and then reached over there to put the oil there.

Q You had no trouble in oiling that bearing on the shaft where the small cog-wheel was attached to—you had no trouble in oiling that bearing?

A He put the oil there and nothing happened, he said.

Q It was perfectly safe to put that oil in there, wasn't it?

A He don't know whether it was or not.

Q I am asking you now—it was perfectly safe, as you look at it now, for you to have put the oil in the bearing here on the left?

A He doesn't know—he doesn't know.

Q You could see that cog-wheel revolving, could you not?

A Sure he could see it.

Q You knew that if you got your hand on that cog-wheel you were going to get hurt, didn't you?

A He didn't know it—if he did he would not have gone up there for all America.

Q You knew that wheel was revolving or rolling very rapidly and if you got your hand in it you were going to get hurt, didn't you?

A He didn't know; if he knew he would have quit and went home.

Q You have worked around the other motor and had been working there about three weeks?

A Yes.

Q And you knew when the machinery is revolving and the wheel is revolving fast, you know very well, don't you, Mr. Melovich, that if you got your hand on that revolving wheel you are going to get hurt, or get your body on it?

A He knew nothing about it. On the machines where he worked the cog-wheels were covered up there and he knew nothing about it.

Q You had seen wheels revolving all your life and you worked as a brakeman on a train, didn't you?

A There is no gravel machine in the power house and he doesn't know about it.

Q Do you mean to tell the jury, or do you want them to believe, that you did not know and could not know whether there was any danger in coming in contact with a rapidly revolving shaft with cog-wheels on it?

A He does not know anything about it; he said he would rather have his hand today than all that machinery and things.

Q Do you tell the jury that you did not know, and did not know at the time you were hurt that you would get hurt if you got your hand tied up in a revolving wheel?

A He doesn't know—he didn't know. If he had known he would never have gone up there.

Q You know very well if you got in contact with a wagon wheel that is going fast—if you stick a stick in it you know it is going to hurt you, don't you?

A He never did anything like that.

Q You have described this machinery here with a great deal of accuracy; now, if it was safe to oil this bearing I want to know why it was not safe for you to oil that one across there (showing)?

A He said why wouldn't it, because the big cog-wheel was going in front of him, he says, sure it is.

Q Why did you try to avoid the cog-wheel?

A How can he get back there when he had to reach over there to oil it?

Q You didn't raise your hand or deliberately put your hand into this cog-wheel, did you?

A No, he didn't put it in there.

Q Why didn't you just reach across there—why did you pay any attention to the cog-wheel?

THE INTERPRETER: I will have to ask that question again. He is telling about something else.

A You can reach under—you can't reach around it, you have to reach over there that way.

Q Did you deliberately put your arm upon that cog-wheel?

A He said, why should I answer that—he said I told him once if I put my arm over there I would rather have my arm now than the whole of the United States.

Q Answer my question; whether you did on purpose put your hand in that wheel, that revolving cog-wheel?

A No, he didn't put his hand in there.

Q Why didn't you put your hand in there deliberately, if you didn't know the danger?

A Why should he put it in there; he said he was only oiling the cog-wheels and not the cans over there.

Q When that wheel was revolving you did not put your hand on it because you knew it was dangerous and you tried to avoid that revolving wheel, didn't you?

A He didn't know—he didn't know anything about it; if he knew he would not have went up there.

Q You knew that that wheel was dangerous, that revolving shaft was dangerous, and you tried to avoid it, didn't you?

A He said he didn't know—he would not have went up if he had knowed.

Q Never mind whether you would have gone up if you had known. I want to know if you did not try to avoid getting hurt on that wheel and tried to keep your clothes out of it.

A Nobody told him anything about it, and he does not know. How could he?

Q Why did you say just now that you pulled your clothes away so as not to get it caught on the wheel, if you did not know that it was dangerous?

A He said he didn't pull his clothes.

Q You said a moment ago in your testimony—in your testimony just now—when you came over here to oil this that you pulled your clothes away and reached over so as to keep off the wheel?

A It didn't catch him down at the hand—it caught him right there (showing).

Q Didn't you try to keep your clothes off the cog-wheel?

A He didn't have to—his jumper was tight fitting.

Q Didn't you try to keep your clothes away from the cog-wheel?

A He was not careful—he didn't know—he doesn't know anything about machinery.

Q You didn't pay any attention to it—you just went to work recklessly and let your jumper get loose and get caught in there deliberately, did you?

A No, just went up there and he oiled the box and went over in the corner and it caught his arm.

Q You could see this cog-wheel revolving, could you not?

A He could see it but not when it was going fast, something like the wind.

Q You didn't oil cog-wheels while they were in motion, did you?

A Two or three times he went up to oil it.

Q You didn't oil the cog-wheels—you oiled the bearings?

A No.

Q How long was this can? How long a neck did it have to it?

A About one foot long in all.

Q Did it have a crooked stem?

A Yes, sir, the spout on the end was straight.

Q What was the distance between those two bearings?

A He doesn't know—he didn't measure them.

Q About how far?

A He doesn't know. If he measured it he would know.

Q Give me your best judgment?

A There was a shaft here (showing) and a shaft here (showing).

Q How far between them?

A He doesn't know; he could not tell.

Q It was light there when you went up—you could see plainly?

A Yes, it was day time—he could see.

Q It was perfectly light there, wasn't it?

A You could see well; it was day time, although it was boarded and it made a dark shade on it; the lamps were there.

Q Why didn't you oil the cogs while the machine was in motion?

A You don't have to put the oil on the cog-wheel that goes around.

Q Do you mean to tell me that you didn't know that there was any danger—if you deliberately put your hand in that revolving wheel you thought it would not hurt you, did you?

A He doesn't know—no, he would not have done anything like that—he would not have.

Q I want to know whether you didn't know it was dangerous for you to deliberately put your hand in that wheel.

A No, he doesn't know anything about it.

Q Then you didn't think it was dangerous, did you?

A He doesn't know anything about it and didn't know.

Q Didn't you testify in the trial of this case the last time that you knew it was dangerous?

A He don't remember—he don't know that he said it.

Q Didn't you state in your former examination, the former

hearing of this case, that you would not have put your hand in that wheel for anything and you would not be fool enough to put the oil can in that revolving cog-wheel?

A Yes, he said he asked him and asked him and asked him and he said "I am not crazy enough to stick my hand in there."

Q You said you were not crazy enough to stick your hand in there—that was what you testified on the former trial?

A He said that he remembered this way, that he told me to tell the lawyer that anybody that had any sense would not put his hand in there.

Q That is it exactly, and because you had some sense you would not put your hand in it either, would you?

A I would not have gone up and he would not have put his hand in there if he knew it would have took his arm off.

Q And you would not be crazy enough to do that, as you said on the former trial, to put your oil can in that wheel?

A He didn't know; if he had known he would not have done it.

Q You will now say—you will not deny now, that you knew that it was dangerous to put your hand around that wheel or in it?

A He said he will tell you a thousand times over he didn't know there was any danger there.

Q You were not crazy enough to put your hands in that wheel and nobody else would be crazy enough to put his hands deliberately on those cogs revolving around.

A He said he is not crazy, exactly, but he said that is not his work and he knows nothing about it.

Q And the reason you would not be crazy enough to put your hand on that cog-wheel is because you knew it would hurt you if it did, wasn't it?

A He said no, he didn't know it—he told you a thousand times he didn't know it.

Q Why did you say you would not be crazy enough to put your hand on that revolving wheel, if you did not know that it was dangerous?

A He said the lawyer put the question before him that way: "Why didn't you put your hand in the wheel" and he said that he was not crazy enough to do a thing of that kind.

Q And the reason that you were not crazy enough to do a thing of that kind is because you knew you would get hurt if you did?

A He didn't know.

Q Ask him that again, and I want an answer to that question and tell him so, will you?

MR. MEYERS: Just a minute. The question in issue in this case is whether in oiling this machine it was dangerous, and Mr. Kerr asked him the same question a hundred times—

MR. McCORD: And I haven't got an answer yet.

THE COURT: I think you have dwelt upon it long enough, Mr. McCord.

MR. McCORD: I want an answer. He evades the question.

MR. MEYERS: He said he didn't know it was dangerous, and he told you a thousand times it was not dangerous.

THE COURT: After a witness has persisted in evading a question on cross-examination as many times as this witness has, you have the right to argue to the jury that because he evades it he is not a reliable witness. It affects the credibility of the witness, but there is no need of persisting and spending time on it to force him to answer a question that he doesn't want to answer.

MR. MEYERS: You did not mean to get it in the record and before the jury that this man was evading anything, did you?

THE COURT: The jury will judge of that. I am speaking of the general principle that when a witness evades and persists in evading a question on cross-examination, that that is an important fact for the jury to consider in weighing his evidence, in determining what degree of credibility to give to it.

MR. MEYERS: If Your Honor meant this witness, I would like an exception to that statement.

THE COURT: The reporter took down what I said, and you may have an exception to what I said.

Q Mr. Melovich, didn't you on the former trial of this case, in answer to the following question, make the following answer (reading):

"What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there

when you were putting the oil on the cog-wheels," and didn't you answer that question as follows? "Any crazy man would know better."

A He says he didn't have to tell him he was crazy; he says that he had to go up there and oil this machine or oil this box—he knew he had to do it—he was told to do it.

Q You heard my question and I want to know, not what he is saying now, but whether or not he testified that way at the last trial—I want you to put it to him so that he will understand it—whether or not he so testified on the former trial of this case—whether he did or did not. You understand my question, do you?

THE INTERPRETER: Yes.

A He says that the lawyer asked him a hundred different times, or several different times, why didn't he put his hand in there and he said he told him he was not a crazy man.

Q Ask him to answer me yes or no—did he testify that any crazy man would know better than to put his hand in that cog-wheel?

A Well, he is answering it the same way I gave it to you before. I can't get him to say yes or no. I asked him to answer it yes or no.

MR. McCORD: I would like to have the Court instruct the interpreter to have the witness answer the question yes or no. Did or did he not so testify on the former trial? He persists in not doing so and I would like to have an answer to that question, because his testimony is here just as I have read it.

THE COURT: I will let the other interpreter interpret to him what I am going to say to him now.

THE OTHER INTERPRETER: I will try to.

THE COURT: Will you tell him that on cross-examination when the attorney opposed to him is asking him a direct question that he must not go on talking about everything else but must answer the question directly, and when he answers it—whether he did or did not so testify—he must say "yes" or must say "no." Now tell him that he is required to answer this question that Mr. McCord is asking him directly. He

must say "yes" if it is true and "no" if it is not true. Now ask the question—put the question to him.

Q What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there where you were putting the oil on the cog-wheels, and your answer to it was: "Any crazy man would know better;" I want to know whether that question was asked him on the former trial, and whether his answer was: "Any crazy man would know better."

A Well, he is answering again. He says the lawyer got him so rattled he didn't know what he was saying, and I asked him—I told him again in answering the question to say yes or no, and he answered it the same way again, saying that the lawyer had asked him so many times that he got nervous, and he said "A crazy man would not do it."

Q Ask him if he answered the question that way again.

A He don't remember he said it.

MR. MEYERS: Just at that point was where Your Honor instructed Mr. Kerr: "I don't think you should dwell on that point any longer," and it was right when that question was asked in that manner.

THE COURT: Did he understand the question, Mr. David?

THE INTERPRETER, MR. DAVID: I think he did. I think he understood it pretty well. Maybe it could be put to him a little plainer.

MR. McCORD: Suppose you put to him this question—

THE COURT: You may ask him that same question.

MR. McCORD: (Handing transcript of former trial to the interpreter) There is the question right there—that question and the answer (pointing).

(Whereupon the question is put to the witness from the transcript, by the interpreter.)

A He said: "I didn't mean it that way."

Q Ask him if he said it.

A He said he didn't mean it that way, and he didn't answer whether he said it, except that he was telling the other lawyer not to ask him that many questions.

MR. MEYER: Perhaps, Your Honor, I would be perfectly

willing if Mr. McCord so wishes it, to allow this whole record to go into the record in this case.

THE COURT: Well, that does not serve the purpose. He is asking the questions on cross-examination to test the witness.

MR. MEYERS: I will be perfectly willing to have this all go into the record in this case.

THE COURT: So that the jury will judge about his manner of giving testimony, whether his testimony is going to prove his case. But you have dwelt long enough on it, Mr. McCord.

Q How did you put the oil on the cog-wheels when you oiled them?

A He never put it on the cog-wheels; he put it in the cans—in the boxes.

Q Did you ever oil the cogs at all?

A No, he didn't put any in there—he said the boss did that.

Q Didn't you testify in the former trial that you did put the oil on the cog-wheels as well as on the bearings?

A He doesn't remember if he did.

Q Well, did you or didn't you?

MR. MEYERS: If he doesn't remember, how can he tell?

Q Ask him now if he ever oiled the cogs on those wheels?

A The boss went on there and put skid grease on there himself.

Q Did you ever oil the cogs at any time?

A No.

Q How many times were you up there, Melovich?

A Three or four times before his arm was taken off.

Q How many days had you been oiling it?

A When Slim was there he was there six days, he said.

Q You were up there every day for three or four days, were you?

A No, he hadn't been up there all the time—just when they sent him up.

Q On how many different days were you up there?

A Well, every other day he would send me up, that is, he didn't go over there only just when he was sent up there.

Q How many different days was he up there—I don't mean how many times a day, but how many different days?

A He doesn't understand me when I ask him that question.

Q Didn't you have a conversation with Mr. Elmore and Mr. Sears and Mr. Roberts at the office of the company in which you stated that you had oiled that machine eight or ten times a day for seven or eight or ten days, or something like that?

THE INTERPRETER: I will have to ask him that again. He is going on to tell about some doctor taking him up to an office some place.

Q Ask him if he didn't have a conversation with Dr. Roberts and Mr. Sears and Mr. Elmore?

A Well, he says they had some men up there that didn't speak very plain in his language and he was a different nationality, but just in a broken way, and he asked him questions, but he was so sick and didn't feel well and he answered the questions and he didn't know what he was answering.

Q What you mean was that you took this man up there with you, didn't you?

A No, he found him there at the office.

Q Who was it—do you know?

A He doesn't know him.

Q Didn't Mr. Sears, the superintendent, offer to give you a job on several occasions? Just answer that yes or no.

A He said that when he got up there Mr. Sears told him there was Eli, a boss at the mine, to go to work and he would give him work and give him a pile of money.

Q I want you to answer the question yes or no. Did or did not Mr. Sears offer to employ you at your old job at the same salary? Answer that yes or no.

A Yes.

Q In this work you were doing in running this motor you simply had to use your head and turn the lever on—that was all you had to do except oil the motor?

A Well, he says that as long as there is two brakes that he has to use both hands.

Q You oiled your own motor, the one which you put in and had been running about three weeks, as you testified?

A Just in the boxes.

Q You oiled your machine, did you, at all times?

A Yes.

Q Was that motor like the motor that you were hurt on?

A No.

Q What was the difference between them?

A Altogether different.

Q Tell me what the difference was?

A Well, he says at the motor machine he could run that because it is just like running a street car. There is handles and he could run it easy; and another thing, he said, Mr. Savage covered this.

Q Were there any gears on the machine that you were running?

THE INTERPRETER: I am afraid I don't know how to ask him gears.

Q Any cog-wheels on your machine?

A Yes, sir, there was a cog-wheel and a small one, but they were covered.

Q Did you oil these?

A Yes, sir, in the box where it had to be oiled.

Q Did you oil the cogs themselves?

A When he stopped the motor then he would take and put the oil on.

Q Did you stop the motor?

A Yes.

Q Whenever you wanted to oil it then you stopped the motor, did you?

A It doesn't require oil on the motor, only when he starts to work at noon.

Q Did you ever oil that motor while it was running?

A No, sir, and it didn't need it.

Q Why didn't you oil it while it was running?

A It didn't need it and he didn't have time.

MR. McCORD: That is all.

RE-DIRECT EXAMINATION.

MR. MEYERS:

Q You made a statement just now that Savage covered something. Tell him to tell us what Savage covered.

MR. McCORD: I object to that unless it is something in connection with this machine.

MR. MEYERS: You asked him that.

MR. McCORD: I never asked him any such question. He volunteered that, but not in response to my question.

MR. MEYERS: I don't think the jury understood just what it was.

MR. McCORD: I never asked him any such question.

MR. MEYERS: You asked him a question that brought that answer out.

THE COURT: I will sustain the objection.

Q You said just now that you went up to the White Building and had a conversation with the doctor of Stone & Webster —the doctor and Mr. Elmore and somebody else. How did you come to be up there?

A Well now, he is answering—he said that when he was in the hospital that some one came in there to visit him from the company and brought him some papers to sign. I asked him why he came to go to the White Building and he starts in answering it that way.

Q Ask him how he came to go up to that meeting; whether anyone took him up there or not or whether he went up there in company or unaccompanied.

A The company's doctor came there and took him up from the hospital up to the White Building office.

Q When was that, with reference to the time he left the hospital?

A The same day that he left the hospital.

Q After he had this meeting he did not go back to the hospital?

A No.

Q Tell the jury just what happened in that meeting that they mentioned, between the doctor and Mr. Elmore; tell the jury just what happened?

A When he came up there that day he was taken up there by the doctor and when he got to the office Mr. Sears was there and Mr. Roberts and the doctor, and they asked him if he would like to go to work, and he said to them: "What can I do with one arm?" He says then that some one told him that Eli

wanted him to go back to work, that he would give him steady work, a good job, and give him something—give him some money.

Q Was the amount of money mentioned?

A Smith told him he would give him a few hundred dollars.

MR. MEYERS: That is all.

ELI MELOVICH, recalled in rebuttal, testified as follows:

MR. MEYERS:

Q Eli, Dr. Elmore has testified that he visited you in the hospital, and when he visited you at any of those times that he mentioned, state whether or not he said anything about settling the litigation, or anything of that kind or nature?

MR. McCORD: I object to that as not proper rebuttal. Dr. Elmore never said that, because I never asked him that.

MR. MEYERS: Dr. Elmore said that he never made any mention of any settlement in any of his visits.

MR. McCORD: I don't think I asked him that question. The only question I asked him was in regard to the conversation in the White Building.

MR. MEYERS: I said on any visits that the doctor made to him or when he saw him.

MR. McCORD: You said in the hospital, and you limited it to that one place, or I would have had no objection.

MR. MEYERS: I will change that question then to—during any visits of Dr. Elmore to you at any place?

MR. McCORD: I object to that question unless he limits it to the meeting in the White Building, to which Dr. Elmore testified that nothing was said about a settlement.

MR. MEYERS: Dr. Elmore stated that he never made any such statement and the testimony will show that.

THE COURT: The way to put an impeaching question is to refer the witness to the precise time and the persons present and ask him if the doctor did say or did not say those words, or words to that effect. This is an instance where you want to put leading questions to your own witness for the purpose of fixing the time, place and persons present.

Q Were you ever present at the White Building when Dr. Elmore and several other officers of the Stone & Webster Company were present also?

A Mr. Sears, Dr. Elmore and Mr. Smith.

Q How did you come to be there, Eli?

A The doctor came to the hospital and took him up there.

Q Did you tell the doctor you wanted to go up to the White Building?

A No, sir, he didn't tell him he wanted to go any place. The doctor said: "Come on—come up—the company wants to see you."

Q Tell him to tell the jury just what happened when he got up there.

A He said that when he went up there the doctor took him up and that when he came up to the office there were three or four men there and that there was some man that tried to talk the Slavonian language to him, but he could not understand it because it was a broken language of some other country that he spoke, and he asked him several questions and Mr. Sears told him that the superintendent Eli wanted him—called him to go back to work, and he said: "What I can do with one arm—I can't do so much with one arm," and Mr. Smith remarked that he would give him some money—a little pile of money, and to go back and he would have steady work.

MR. MEYERS: That is all.

WILLIAM SAVAGE, a witness produced on behalf of the plaintiff, testified:

That he had been working around different kinds of machinery for about thirty-five years and was familiar with various kinds of machinery and with machinery used in construction work.

Q Do you know whether the cog-wheels and machinery around the motor were guarded or not, Mr. Savage?

Objected to as irrelevant, incompetent and immaterial.

Objection overruled and question repeated. Exception taken and allowed.

A The one he was supposed to run?

Q Yes.

A Yes, they were guarded.

Q How do you know that?

A I guarded it myself.

Q What was your position at that time?

A At that time I was putting up that motor.

Objected to. Objection overruled and exception noted for defendant.

Q Mr. Savage, is it customary for companies to guard cogs of that sort?

A Well, it has been in all my cases.

MR. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied. Defendant excepted and exception was allowed.

Q I will ask you to examine that picture (handing photograph marked Exhibit "A" to the witness) and state whether or not it would be possible for a man to oil the boxes around the cogs and the wheels without reaching over the wheels—as that machine is constructed there?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent. He said he never saw the machine and does not know about the connections and does not know how it is constructed, and does not know about the platform, and has not been there; and it is not a proper hypothetical question.

MR. MEYERS: He does know them.

THE COURT: I will overrule the objection. He can answer if he knows enough about it to answer it.

THE WITNESS: What is the question?

MR. McCORD: If you will stop picking your teeth we could hear you better.

THE WITNESS: I asked what the question was, as I can't hear half what you say. If you will pardon me, I don't want to be volunteering anything.

(Question repeated to witness.)

A Well, that is a question that is pretty hard to answer from the photograph, because I was never on the top of it and I don't see how I could.

Q You know nothing about the dimensions of that machine, you say?

A Only from looking at it.

Q Looking at it from where?

A From the track—that is, from underneath it.

Q Did you ever see them taking this machine down and putting it up?

A Yes.

Q State how that cog-wheel might be guarded to make it more safe, if it is possible to make it more safe than an unguarded wheel?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendant.)

Q How that wheel might be guarded to make it more safe, if it is possible?

A Well, they could have boxed in the big wheel as far out as the shaft and the sides of it, which would have made it more safe.

Q Speak out.

A I said they could box in the side and back of the gear wheel between the gallows frame, to make it more safe.

Q Would the change which you suggested in any way interfere with the working of the machinery?

MR. McCORD: I object to that as irrelevant, incompetent and immaterial.

(Objection overruled and exception noted for defendant.)

A None.

Q Mr. Savage, would it be sufficient—are you sufficiently familiar with that machine to state whether that platform could have been extended and built out in any way and changed without being interfered with by the machinery?

(Objected to as irrelevant, incompetent and immaterial. Objection overruled and exception noted for defendant.)

A I said yes.

Q Well, if you are familiar enough, will you state to the jury what might have been done to enable a person oiling those wheels to have gotten sufficiently close to the different boxes without reaching over any of them?

MR. McCORD: I object to that as irrelevant, incompetent and immaterial and it is not within the issues in this case, and the witness has not shown himself to be qualified to give any such opinion.

(Objection overruled. Exception noted for defendant.)

A Yes, sir, it could have been changed so as to get up closer to the boxing.

Q Mr. Savage, what change might have been made to have made it more safe?

A Well, there is two or three ways they could have changed it of course.

Q State to the Court and jury.

A One, they could have put another platform above that one so as he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q If you are familiar enough with that machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog-wheel any closer than they would be from the machine, as you know it?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled and exception noted for defendant.)

A Yes, sir, they could have changed it so as to have got closer to it.

Q How would that have been done?

A By putting another platform above the one that was there or raising that one.

On cross-examination the witness Savage testified that he was not familiar with the dimensions of the machine or the platform or anything about it; that he never was upon the machine—just saw it from the ground, a distance of eighteen or twenty feet; that he never took any measurements and did not know how far the cog-wheel was above the platform. That it looked like it might be four or five feet high and the width of it was about four feet. That the two cog-wheels were right over the center of the platform.

Q And the two cog-wheels were right in the center, were they not?

A Well, yes, that is practically close to the center; they would be to one side of the center.

Q That is about four feet between the bearings and between the boards on either side, the belt on the one side and the buckets on the other, where the man would stand, there would be about a four foot opening there, or what was it?

A About twenty inches, or twenty-four.

Q What is that?

A About twenty or twenty-four inches—that is between the gallows frame.

Q Between the cog-wheels on either side would be about twenty-four inches?

A Well, the cog-wheels would be closer to one side than the other.

Q Do you know which side it was closer to?

A Well, it would naturally be closer to the side that the conveyors were on—in other words, the buckets.

Q Would it be the right side or the left side, looking toward the cog-wheel from where the man oiling it would be standing?

A Well, the belt on this one would be on the right side to a man standing on the platform, and the gear wheels would be practically close to the center, and the buckets on his left.

Q It would be practically in the center, wouldn't it?

A Yes, that is in the center of the whole gallows frame.

Q Leaving about two feet on either side between the bearings and the cog-wheels?

A Something like that, yes.

M. L. LORD, a witness produced on behalf of the plaintiff, testified as follows:

That he was a mechanical and electrical engineer and had had many years' experience in the handling of machinery of various kinds, and had designed a number of machines similar to the one in controversy. He was shown plaintiff's Exhibit "A," a photograph of the machine and premises, taken after the plaintiff came out of the hospital; stated that it was customary to place what are known as housings, generally a sheet-iron housing, over gears.

Q Just how is it constructed and what is the nature of it; tell the jury, Mr. Lord.

A A house is sheet-iron that is placed in this one over the top of the gears. It generally fits down close to the gears. It has to be determined for two purposes—it acts as a protection from—

MR. McCORD: I object to the witness stating the purpose, as not responsive to the question, and as irrelevant, incompetent and immaterial.

(Objection overruled. Exception noted for defendant.)

A The housing is placed there for two purposes; it is to protect the gears from the danger of anything getting into them and keeping dirt and stuff out, especially in this line of machinery, gravel and stone works; to prevent stone getting down into it, because there is considerable wear on the gears, and that is one of the principal reasons we placed it on there, it is protection against wear and danger of anything getting in there, because it is impossible with that housing over the gears for anything to drop in there.

Q Does the guarding or housing of those cogs interfere in any way with their efficiency as wheels?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent. Objection overruled and exception noted for defendant.

A Not in the least.

On cross-examination the witness stated:

A I mean to say on the majority of plants which I have visited, of which I took note, has guards placed over the wheels —in other words, houses.

Q You mean in factories and mills?

A Yes.

Q And there all the machinery is guarded, in manufacturing plants, is it not?

A Well, take it generally.

Q That is, it is required to be guarded where it can be guarded, under the Factory Act as it exists in this state, in said manufacturing plants?

A Most always a housing is placed over gears where they turn down.

Q Prior to the time of the passage of the Factory Act a great deal of the cog-wheels and shafting was left unguarded, wasn't it, in the majority of cases around saw mills, and it was not guarded as a rule where it was open and where a man could see it—it was not customary prior to the passage of that act to guard machinery, even in saw mills and manufacturing plants, was it?

A Yes, I must say it was; most constructing engineers generally regard it as necessary.

Q But I sa—

A (Continuing)—and planned accordingly.

Q I say it was the general rule to guard it prior to that time, was it?

A I believe, according to my experience it was, yes.

Q You never saw one without the guards?

A Well, I have seen machines without guards, but I must say that the majority of them have guards or housing.

Q That is, those that are in permanent plants or in temporary plants?

A Well, that is a pretty hard question to decide. The majority of gravel plants are permanent—the majority of plants I visited are practically permanent, that is, they have been established all the way from five to fifteen or twenty years.

Q In a plant of this kind a man would have very little occasion to go up there, except to oil the machinery.

A Well, he would have to go up there for a good many purposes; he would have to go up there to oil the machinery and probably there would be more or less belt troubles that he would have to attend to.

Q He would not come in contact or come near this cog-wheel except in oiling this machinery, would he, as a rule?

A Yes, as a rule.

Q Sir?

A That is the rule, yes, sir.

Q You heard Mr. Savage say it was about four feet between the bearings, didn't you?

A I don't believe I paid any attention to his testimony.

Q Assuming that he said that, and the cog-wheel was right in the center, and that would leave two feet to either side for oiling purposes, now there would be no occasion for a man to go above there—

A Well, of course the shaft would take up a great deal of the space and would not leave much space for a man to get around.

Q I say, in front of it; if a man was standing in front of it and looking towards it, with the platform four or five feet wide for him to stand on, I say there would be no occasion for anybody else going near that machine except for the purpose of oiling it, or fixing the machinery, would there?

A Well, apparently it would not. Of course it depends a good deal on conditions. I did not pay particular attention to that lifting apparatus there. They might have some trouble due to the apparatus clogging at the point of discharge. It might be possible that a man would have to go up there to clear that sometimes.

MELI MELOVICH, called as a witness on behalf of plaintiff. He testified that plaintiff was injured upon the machine described in the complaint, on the 12th of July, 1910.

O. D. EDMONSON, a witness called on behalf of plaintiff testified:

That he had had some experience around machinery, but that he was a photographer and took the pictures introduced in evidence on the part of the plaintiff; that he took certain measurements of the machinery; that the width of the wheel was 6¾ inches and the diameter of the wheel was 3 feet; that the distance between the large cog-wheel and the driving wheel was 1 foot 7 inches; that the gravel machine was about 30 feet from the ground.

Thereupon the plaintiff rested and the defendant called as its first witness C. A. SEARS, who testified as follows:

That he was superintendent of construction of the Stone & Webster Engineering Corporation; that he was a mechanical

and electrical engineer; had been employed by the company for about two years and was acting in that capacity along about July 12, 1910, the day of the accident; that he was familiar with the gravel plant where plaintiff was injured; that it was constructed under his direction. Witness then identified defendant's Exhibit "1," which was offered in evidence without objection. He testified that the exhibit showed the measurements of the distance between the bearings and so on; that the drawing was taken from the machine in question.

Q I will ask you to indicate on that plan which you have there by the letter "A" the point where a man would stand who was oiling this machine, upon the platform. There are four bearings there, are they not?

A Yes.

Q Now, will you mark the four bearings, indicating by the letters "B," "C," "D" and "E" so that the jury may be able to know just where the bearings supporting the cog-wheels are located?

A I have marked them "B," "C," "D" and "E."

Defendant's Exhibit "2" introduced in evidence.

Q If a man was standing at the point, at the letter "A" which you have indicated, where would he be standing with reference to the revolving cog-wheels?

A The cog-wheels would be directly in front of him.

Q What is the width of the platform, or the size of the platform upon which a man would stand oiling the machine?

A It is probably about four feet wide and six feet long.

Q What is the distance between the bearings, Mr. Sears?

A It is given on the blue print. I cannot tell it from memory.

Q You can tell by examining the blue print?

A Yes. From center to center of the bearings is 21 inches.

Q Where are the cog-wheels located?

A They were located midway between.

Q An equal distance on each side, that is the distance from the cog-wheels over to the supports of the bearings was 21 inches?

A No. From the center of one bearing to the center of the other was 21 inches. The cog-wheels are located there. (Referring to Exhibit.)

Q What is the distance on the platform, four feet, you say?

A About four feet.

Q What is the distance between the bearings supporting the smaller cog-wheel and the one supporting the larger?

A About 14½ inches.

Q What is the diameter of the larger cog-wheel?

A 24 inches.

Q And the diameter of the smaller one?

A 5 inches.

Q About what height is the shaft supporting the cog-wheel from the platform?

A My remembrance is it was about to here on ordinary sized man.

Q Just above his breast?

A Yes.

Q About what height would it be? You can give your best judgment.

A I should say about four feet—a few inches over four feet.

Q In oiling that machine I will ask you, Mr. Sears, whether a man could, by the exercise of reasonable care, in your judgment, oil the bearings on both the shafts without coming in contact with the cog-wheels?

A I don't see any reason why he could not.

Q He would have on the right-hand side, between the cog-wheel and the timber there supporting the bearing, about 24 inches, wouldn't he?

A No.

Q How much would he have?

A About 10 inches.

Q How far on the other side?

A About the same.

Q And it is about 14½ inches between the two bearings of the two shafts?

A No, it is 21 inches between the centers of the two bearings, the bearings themselves being, probably, 4 inches long.

Q I will ask you Mr. Sears if you had any familiarity with other gravel plants similar to this one in operation in this state?

A Not exactly similar. No, this was an unusual place and required unusual methods of handling gravel.

Q Just tell the Court how the machine was constructed?

A This machine is located in a gravel pit, and the sand and gravel, or the material dumped from the pit, dumped into a depression known as the boot, and the material then was elevated by this machine to a height, I think in this case about 25 feet, and it was dumped over into a trough and mixed with water and run down a separator with screens, etc., so it would separate the sand from the gravel, and also wash it.

Q Have you seen other elevators—are you familiar with the means of operating other elevators of gravel plants and other elevators similar to this?

A Yes, sir.

Q I will ask you what the custom is in this community and the State of Washington, with reference to elevators in gravel plants, as to whether the bearings at this point where the plaintiff was injured should or should not be guarded—I am asking you if you know what the custom is?

A There are very few of them guarded.

Q What would be the custom then?

A On most of them that I have seen they are unguarded; usually in flouring mills and wheat elevators and so forth they are very seldom guarded.

Q As to whether there was anything on the platform to interfere with a man's vision in seeing the cog-wheels in operation?

A No, sir; no.

Q Do you know what time of day this accident occurred, Mr. Sears?

A It was in the afternoon, about 2 or 3 o'clock if I recollect it right.

Q I will ask you whether there was any covering to this building—or was it a building?

A It just had a shed over it, just to protect the motor from the rain.

Q How was it operated?

A By an electric motor.

Q Where did you get the power?

A From the Seattle-Tacoma Power Company.

Q Do you know where any of the other employes of the company that were present at the time of this accident are now?

A I was not at the accident so I do not know who was there.

Q How long have you known the plaintiff?

A I noticed him on the works probably two or three weeks before the accident; maybe longer, maybe a month or six weeks before the accident.

Q Do you know anything about what position he occupied?

A No, I do not. I remember noticing him and having my superintendent speak of him as an unusually bright man, and that he was advancing him, both him and his brother and a couple of cousins, I understand. One of his brothers is still in the employ of the company.

The witness further testified that after the accident the plaintiff stated that he oiled a number of times, a number of days and a number of times a day, but that he did not remember the exact number of times or days.

The witness further testified that he offered the plaintiff after he left the hospital the same place that he had held before at the same wages and that there was nothing to prevent a man with one arm from operating the machinery.

Q (Mr. Meyers) Did you, on the occasion of the former trial, Mr. Sears, make a statement in answer to a question of this sort: "So that in oiling the bearing farthest away from you, what would be the distance he would be required to reach with his oil? A About 18 or 20 inches?" I think you just made the statement that it was 14½. I just wanted to know whether or not you made that statement?

A Well, those distances I am giving you are from memory and approximately. I might vary 3 or 4 or 5 inches, and maybe 6 inches in giving my testimony.

Q And did you on the occasion of the former trial, in response to this question: "Q How close to it, Mr. Sears—close enough so that he could see it? A Oh, yes, probably

50 or 60 feet. That is, the place where the men would pass in proximity to the gravel machine. You just now said 10 or 15 feet. Did you make that statement?

A Well, I would like to know the question.

Q (Reading) "Q How close to it Mr. Sears—close enough so he could see it?

A Oh, yes. Probably 50 or 60 feet.

On re-direct examination the witness further testified:

Q Mr. Sears, a man would have to reach how far, did you say standing up in front of the cog-wheel on the one side or the other, how far would he have to reach over to oil the farthest bearing—the bearing supporting the big cog-wheel?

A I suppose it would be 15 or 16 inches.

Q And what was the usual and ordinary length of the can that was used in performing that duty? Whatever the can was —what is the length of the can that is ordinarily used out there?

A Well, we had cans from the small sizes to the large ones, and I do not know what can he was using there.

Q You do not remember what it was. Assuming that there was a 12 inch can used, including the stem, I will ask you is there any reason that occurs to you why a man of fair average intelligence could not oil that bearing without coming in contact with the moving wheel?

A No, there is no reason that I know of.

Q A man with his eyesight unimpaired could see the danger as well as a college graduate, could he not?

A I should think so—yes.

DAVID ROBERTS, a witness on behalf of defendant, testified:

That the plaintiff was asked by him, after he left the hospital, how many times he had oiled the machinery. That he stated he had oiled it for a period of twenty days about ten times a day. That the plaintiff could speak English very brokenly, and that he was offered a position after he left the

hospital at the same wages as he had earned before the accident, and that he was perfectly capable of performing the same work.

JOHN H. BERRIAN, a witness for the defendant, testified:

That he was engaged in designing and constructing elevators; that it was not customary in the State of Washington to guard bearings and cog-wheels in gravel elevators or other elevators; that he does not put those machines up but just sells them.

The plaintiff in rebuttal denied the conversations to the effect that he had oiled the machinery in question for a period of about twenty days and a number of times a day.

DR. BRUCE ELMORE, a witness on behalf of the defendant, testified:

That he had been a surgeon for about ten years; was a graduate of Columbia University; that he was the first medical attendant upon the plaintiff after the accident.

Q What did you do with him after you found him?

A I knew the nature of the injury, that is, it had been telephoned down, so I at once—with my assistants—prepared him and examined the arm and found that it was almost completely severed; there was practically nothing left but a little skin that held the arm to the shoulder, so I did a complete amputation a few inches below the joint.

Q How far below the shoulder joint?

A I think it is about two inches of bone that is left. I can only state from memory.

The witness testified further that there were a number of abrasions, not many and not severe on the face, head and breast; that he had complete charge of the plaintiff from that time on; that he was present at the meeting between Mr. Sears, Mr. Roberts and plaintiff in the White Building; that he engaged in the conversation. Upon cross-examination the witness testified as follows:

Q (Mr. Meyers) Doctor, in the former trial you were asked this question: (Reading) "Q From your experience as a physician and surgeon and having performed that operation and treated the plaintiff until August, what would you say as to whether there would be any ill results following from the loss of that arm, other than the loss of the arm itself? Any constitutional injuries resulting from it? A In very few cases would there be any." Now, were you asked that question and did you give that answer?

A I presume so.

Q And were you asked this question: (Reading) "Q Doctor, you would not say that Eli Melovich here had not suffered any pains in his chest or had any ill effects so far as that would be concerned, in coming in contact with the cogs, would you? A I don't understand the question; he had pain, certainly." And you were asked this question: (Reading) "Doctor, I show you a scar here—is that approximately where the cut or abrasion you mentioned was? A Why, I think so—I know it was on the face." Did you make that statement?

A I presume I did.

Q And did you give this testimony: (Reading) "Q There was considerable blood flowing from that wound, was there not? A Oh, yes." Did you make that answer?

A I remember saying there was blood all over.

Q "Considerable blood flowing from his arm and also his face? A Why, he was covered with blood." Did you make that answer?

A Yes.

Thereupon, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions, and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause, as provided by law.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 22, 1912. A. W. Engle, Clerk. By S., Deputy.

United States Circuit Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.

No. 1934.

Delivered Nov. 6, 1911.

ORAL DECISION ON MOTION FOR JUDGMENT *NON OBSTANTE VEREDICTO* AND FOR A NEW TRIAL.

This is a case in which the jury rendered a verdict for more than $12,000 damages to a man who, while working in plain view and conscious knowledge of the operation of unguarded cogs suffered himself to get in contact with the cogs and lost an arm and was scratched and injured otherwise. As I indicated on the trial, the rules of law which precludes a recovery by a workman from his employer for injuries suffered in consequence of exposure to a known danger and in consequence of his own contributory negligence, should have entitled the defendant to a non-suit or directed verdict, but the decisions so often repeated by the Circuit Court of Appeals for the Ninth Circuit requiring personal injury cases to be determined by juries, constrained me to submit the case to the jury. Whilst it is true that these cases must be decided by juries, nevertheless when a verdict is rendered which in the mind of the trial judge is unconscionable and contrary to the law, the Court in the exercise of a sound discretion can at least require that two juries shall be given an opportunity to pass on the case before the decision becomes final. I have a consciousness and did have before the hearing of the motion for a new trial in this case, that the verdict is unjust and that is the foundation of this decision granting a new trial; the superstructure is that—I find that the case was submitted to the jury under an erroneous instruction. The Court read to the jury an instruction requested by the plaintiff's attorney, containing an error,

by it the jury were instructed in effect that they could consider *any negligence* on the part of the defendant which the evidence proved. This was materially erroneous and at variance with other instructions given requiring the jury to decide the issue as to the particular negligence specified in the complaint. Counsel for the plaintiff wrote that instruction and the Court read it to the jury, and counsel for the defense, alert for the protection of the defendant's rights, failed to take notice of that error at the time. I can only explain it on the theory that from weariness my mind was not acute as it should have been at that time. Now, although it was not excepted to at the time it is a matter that appeals to my discretion and I believe that justice requires the granting of a new trial so that the case may be again submitted to a jury under instructions free from error. The defendant's motion for a judgment *non obstante* is denied and the motion for a new trial is granted.

C. H. HANFORD,
United States District Judge.

Indorsed: Oral Decision on Motion for Judgment *Non Obstante Veredicto* and for a New Trial. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1394.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, as principal, and NATIONAL SURETY COM-

PANY as surety, are held and firmly bound unto Eli Melovich, plaintiff above named, in the sum of Six thousand and no/100 Dollars ($6,000.00) to be paid to the said Eli Melovich, his executors, administrators and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this the 8th day of June, A. D. 1912.

WHEREAS, defendant above named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above named Court in favor of the plaintiff and against the defendant in the sum of $4,262.00 and costs to be taxed at $.....

NOW THEREFORE, the condition of this obligation is such that the above named defendant shall prosecute said Writ of Error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed the day and year first above mentioned.

STONE & WEBSTER ENGINEERING CORPORATION,
By KERR & McCORD,
Its Attorneys.

NATIONAL SURETY COMPANY,
(Seal) By M. H. ARNOLD,
Resident Vice-President.

Attest: GEO. W. ALLEN,
Resident Assistant Secretary.

Service of the foregoing bond is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Approved June 10, 1912.

C. H. HANFORD, Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

COURT'S ORDER AND STATEMENTS.

This matter coming on for hearing this 30th day of October, 1911, after the motion had been argued by Herbert W. Meyers, attorney for plaintiff, and Kerr & McCord, for defendant, and the Court being duly advised, makes the following statements and order:

"A granting or refusing to grant a motion for a new trial is a matter in the sound discretion of the Court. I would not assume to grant a motion for a new trial where there is no legal ground, but this case on its merits appeals to the discretion of the Court. I think the motion should be granted. Now there is legal ground shown by this motion in this, that by the instructions given there were errors in the manner in which the case was submitted to the jury. The Court did intend to instruct the jury that it was necessary to find specifically that the negligence charged in the complaint had been proved. The Court did so instruct the jury, but that was inconsistent with the other instruction given, to find for the plaintiff if the evidence proved any negligence. Now that word "any" is especially important when considered in connection with the arguments, for the argument took pretty wide scope and counsel labored with the jury to convince them that the defendant was guilty of wrongdoing towards this plaintiff by putting him in a position of peril, insisting that he was exposed there to extraordinary dangers that were not charged in the complaint, and when the jury heard the Court say "any negligence," they may have thought that they were justified in rendering a verdict on

general principles against the defendant, and that would seem to be indicated in the amount of the verdict they rendered. The plaintiff appeared here on the witness stand as an able-bodied, robust, healthy man—he lost an arm, it is true, but in keeping with other cases in which verdicts have fixed the amount of damages, $12,000 or $12,500, I have forgotten the exact amount, is about five times as much as usually has been considered reasonable compensation for the loss of an arm, if a man is otherwise physically an able-bodied person. I think this verdict is an unjust verdict and there is legal grounds for setting it aside and the Court grants the motion for a new trial.

C. H. HANFORD, Judge.

Indorsed: Court's Order and Statements. Filed in the U. S. District Court, Western Dist. of Washington. June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PETITION FOR WRIT OF ERROR.

The above-named defendant, Stone & Webster Engineering Corporation, a corporation, feeling itself aggrieved by the verdict of the jury and the judgment entered against it on the 15th day of February, A. D. 1912, in said action, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a Writ of Error to the Honorable Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and pro-

vided, and that an order be made fixing the amount of security which defendant shall give and furnish upon said Writ of Error, conditioned as required by law as in cases where supersedas and stay of execution are desired; and that upon giving such security all further proceedings in the above-entitled Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

KERR & McCORD,
Attorneys for Defendant.

Service of the foregoing Petition for Writ of Error is hereby accepted, this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*

No. 1934.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

The defendant having this day filed its petition for a Writ of Error from the judgment entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, all in due time, and praying that an

order be made fixing the amount of security which defendant shall furnish on said Writ of Error, and that upon the giving of said security all proceedings in this Court be stayed pending the determination of said Writ of Error; it is hereby

ORDERED That a Writ of Error is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit; and it is further

ORDERED That upon the defendant, Stone & Webster Engineering Corporation, a corporation, filing with the Clerk of this Court a good and sufficient Bond, in the sum of Six Thousand Dollars ($6,000.00) to the affect that if the said defendant, Stone & Webster Engineering Corporation, shall prosecute the said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and virtue. Said bond to be approved by the Court, and all further proceedings in this Court be and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Seattle, Washington, this the 8th day of June, A. D. 1912.

C. H. HANFORD, Judge.

Service of the foregoing Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ASSIGNMENT OF ERRRORS.

Comes now the defendant Stone & Webster Engineering Corporation, a corporation, and files the following assignment of the errors upon which it will rely on the prosecution of its Writ of Error in the above-entitled cause.

I.

That the Court erred in refusing to sustain defendant's objection to certain testimony of the plaintiff. The following question was propounded to William Savage, a witness for the plaintiff:

Q Do you know whether the cog-wheels and machinery around the motor were guarded or not, Mr. Savage?

To this question the defendant objected on the ground that it was immaterial. The Court overruled defendant's objection, to which ruling defendant excepted and exception was allowed.

II.

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q I show you a picture of a machine, and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cog-wheels of that sort?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent and particularly, Your Honor, in view of the law

as it exists now; under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be customary in a factory or a sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

MR. McCORD: I object to it on the further ground that it is not a proper hypothetical question as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it and did not know anything about it except by passing by.

The objection was overruled and to the ruling of the Court exception was taken and allowed.

Q Mr. Savage, is it customary for companies to guard cogs of that sort?

A Well, it has been in all my cases.

MR. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied. To this ruling the defendant excepted and exception was allowed.

III.

That the Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q Mr. Savage, what change might have been made to make it more safe?

A Well, there is two or three ways they could have changed it, of course.

Q State to the Court and jury.

A One, they could have put another platform above that one so as he could have got handily at it, and they could have

raised the one that was there a little bit and made it a little longer.

Q If you are familiar enough with the machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog-wheel any closer than they would be from the machine as you know it, by any change that might be made on that machine? to which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A Yes, sir, they could have changed it so as to have got closer to it.

Q How would that have been done?

A By putting another platform above the one that was there or raising that one.

IV.

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant. To the ruling of the Court denying defendant's motion for a directed verdict the defendant duly excepted, and exception was allowed.

The following proceedings were taken upon said motion:

MR. McCORD: I now move the Court to take the case from the jury and to direct the jury to bring in a verdict in favor of the defendant in this action, for the reason that upon the entire testimony the plaintiff has entirely failed to make out a case of negligence against the defendant. I do not care to argue the matter at any length; I simply want to call attention to my view of the matter, that the plaintiff, while he was injured, was working in a place where the danger of the machine was open, obvious and apparent to him. He has shown himself to be a man of ordinary understanding and with unimpaired eyesight and he could see this machine and he could see its danger and appreciate it and knew that if he put his hand in contact with it or allowed his clothes to come in contact with the revolving cogs he would be drawn into it and be injured and hurt.

After argument of the motion to the Court the Court ruled as follows:

THE COURT: I consider that it is expedient for the jury to decide this case. I shall deny the motion.

To this ruling the defendant excepted and exception was allowed.

V.

That the Court erred in denying defendant's motion for a new trial, to which ruling of the Court the defendant excepted and exception was allowed.

WHEREFORE the said defendant, plaintiff in error, prays that the judgment of the said trial Court be reversed and that said District Court of the United States for the Western District of Washington, Northern Division, be directed to grant a new trial of said cause.

KERR & McCORD,
Attorneys for Defendant.

Service of the foregoing Assignment of Errors is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the complete record in this cause to be filed in the Court of Appeals for the Ninth Judicial Circuit under the appeal heretofore perfected to said Court and include in said transcript all of the pleadings, proceedings and papers on file herein. Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and on file in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, before the 8th day of July, 1912.

KERR & McCORD,
Solicitors for Appellant.

Indorsed: Praecipe for Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, June 12, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant and Plaintiff in Error.
No. 1934.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 230 printed pages, numbered from 1 to 230, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause and the entire record as the same remain of record and on file in the office of the Clerk of said Court, save and excepting Plaintiff's Exhibits A, B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12, B-13, and Defendant's Exhibits 1, 2 and 3, separately certified of even date herewith, and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause, said exhibits being transmitted pursuant to the order of the District Court made in the said cause July 1, 1912, a copy of which order will be found on page 149 of said record, and that the same constitutes the record on appeal from the Order, Judgment and Decree of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in said cause.

I further certify that I hereto attach and herewith transmit the original Citation and Writ of Error issued in this cause.

I further certify that the cost of preparing and certifying

the foregoing return to Writ of Error is the sum of Three Hundred and Fifty-five Dollars and Seventy-five Cents ($355.75), and that the said sum has been paid to me by Messrs. Kerr & McCord, Attorneys for Defendant and Plaintiff in Error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of July, 1912.

A. W. ENGLE, Clerk.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WESTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Citation in Error.

The President of the United States, to Eli Melovich, and Herbert W. Meyers, his Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, wherein you are Plaintiff and Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 8th day of June, in the year of our Lord one thousand nine hundred and twelve.

C. H. HANFORD, Judge.

Attest my hand and the seal of the United States District Court for the Western District of Washington, Northern Division, at the Clerk's office at Seattle, Washington, the day and year last above written.

(Seal) A. W. ENGLE,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

Service of the foregoing Citation in Error acknowledged this the 7th day of June, A. D. 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: No. 1934. In the District Court of the United States for the Western District of Washington, Northern Division. Eli Melovich, Plaintiff, vs. Stone & Webster Engineering Corporation, a corporation, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy. Kerr & McCord, 1309-16 Hoge Building, Seattle, Wash., Attorneys for Defendant.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable, the Judge of the District Court for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings and also in the rendition of the judgment upon a plea which is in the said Court

before you, or some of you, between Eli Melovich, the Plaintiff and the Defendant in Error, and Stone & Webster Engineering Corporation, a corporation, Defendant and Plaintiff in Error, manifest error hath happened, to the great prejudice of the said Stone & Webster Engineering Corporation, Defendant and Plaintiff in Error, as by its complaint and assignment of errors appears:

We, being willing that error, if any there be, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 8th day of July, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 8th day of June, in the year of our Lord one thousand nine hundred and twelve.

(Seal) A. W. ENGLE,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

United States of America,
Western District of Washington—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Writ of Error and acknowledge service of said Writ of Error by the receipt of a copy thereof.

ELI MELOVICH,
By HERBERT W. MEYERS, His Attorney.
HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: No. 1934. In the District Court of the United States for the Western District of Washington, Northern Division. Eli Melovich, Plaintiff, vs. Stone & Webster Engineering Corporation, a corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy. Kerr & McCord, 1309-16 Hoge Building, Seattle, Wash., Attorneys for Defendant.